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Ontario
Labour Relations
Board

Decisions September 80

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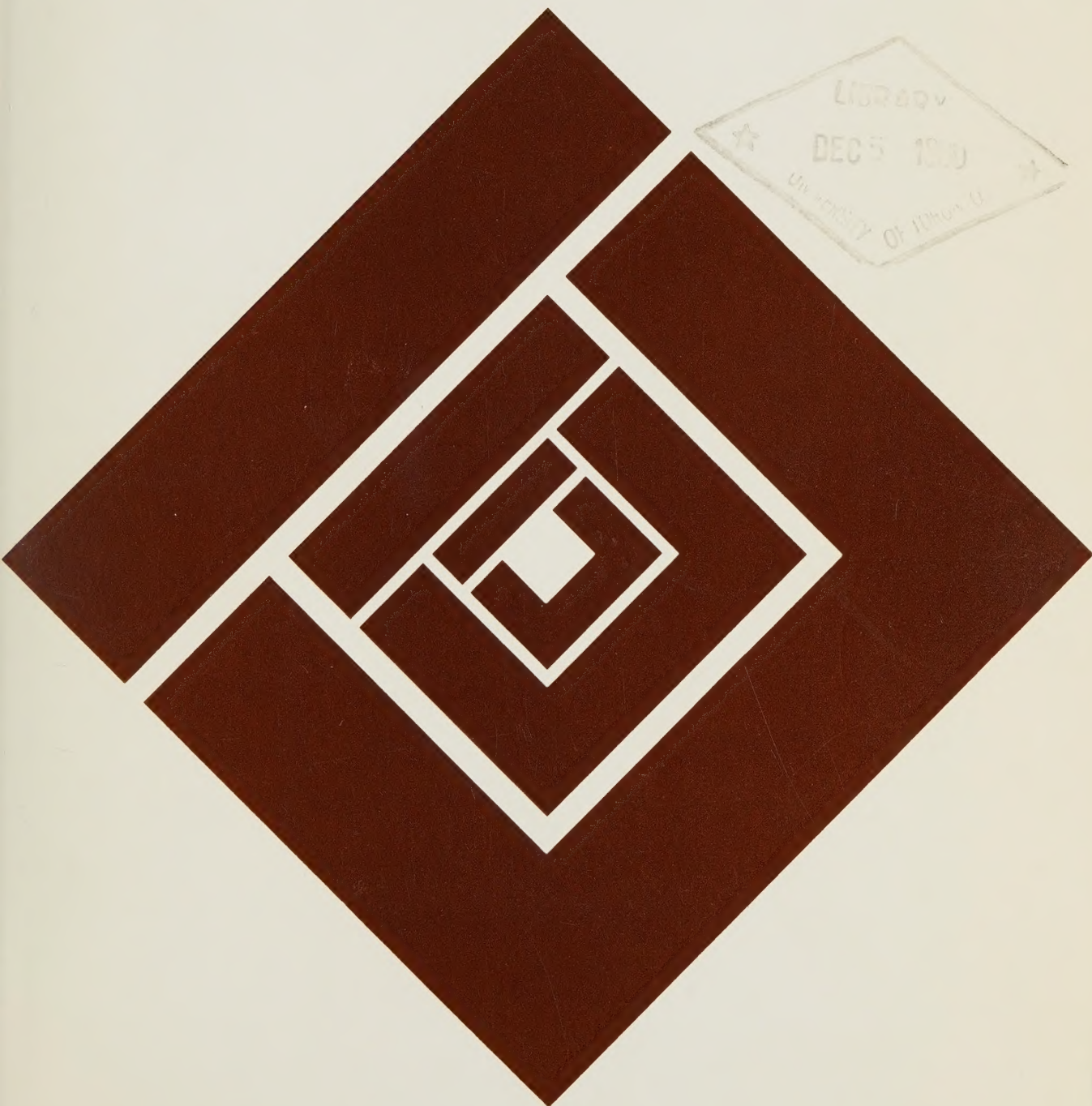
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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1980] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations
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NOTICE OF NEW PRACTICE NOTE

PRACTICE NOTE NUMBER 13

September 8, 1980

AWARDING OF INTEREST

1. The Board stated in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at page 1255 that a decision awarding back-pay or compensation in the form of damages "... should be as fully compensatory as possible and, on request, could bear interest." The Board subsequently determined in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35, that in order to fully compensate a complainant or grievor for monetary losses attributable to a violation of *The Labour Relations Act*, interest will normally be awarded on the monetary compensation ordered by the Board.

2. The formula which may be used in calculating the interest payable on a wage claim is set out by the Board in the following terms in *Hallowell House Limited* at page 45:

"... the Board has concluded that a calculation of interest on the Board's monetary awards should be carried out as follows:

Firstly, taking into account all factors, including the duty to mitigate, assess the wage portion of the compensation award; secondly, divide it in half; lastly, apply the appropriate annual interest rate prorated to reflect the proportion of the year represented by the compensation award."

3. The appropriate annual interest rate normally applied is the prime rate as determined and published by the Bank of Canada in the *Bank of Canada Review* for the month in which the complaint was filed with the Board. The Board in *Hallowell House Limited* used the following as an example of the application of the formula:

"The Board determines that an employee has been wrongfully discharged. The Board's award marks four months from the time of discharge. Over that four-month period the total loss of wages, taking into account mitigation, is established to be \$3,000.00. The prime rate published in the *Bank of Canada Review* during the month the complaint was filed is 12 per cent. The interest would be calculated by dividing \$3,000.00 in half and applying the 12 per cent annual interest rate adjusted to a four-month period, that is, 12 per cent multiplied by 4/12ths. The resulting interest then is \$1,500.00 multiplied by 12 per cent multiplied by 4/12ths or \$60.00."

4. However, for example, where interest is awarded on a non-wage related lump sum damage award, it may be necessary to vary this approach, if there is no need to divide the lump sum in half to reflect the gradual accrual of loss as with wage.

5. A copy of the *Bank of Canada Review* containing the monthly prime rate is on file with the Board. Parties may obtain the Bank of Canada interest rate upon request from the Board or its Labour Relations Officers.

6. The Board in all cases has discretion in awarding interest. Interest may not be awarded, or the rate of interest to be applied to an award may be increased or decreased by the Board depending on the circumstances of each case. However, unless the Board specifically determines otherwise, interest awarded by the Board is to be calculated along the lines adopted in the *Hallowell* case.

0730-80-R United Food and Commercial Workers International Union, Applicant, v. Beatrice International (Canada) Ltd. Malcolm Condensing Company Division, Respondent, v. Group of Employees, Objectors

Certification – Petition – Petitioners’ obtaining employer’s consent to use lunchroom to circulate petition – Foreman entering lunchroom while petition circulating – Whether tacit employer support affecting voluntary wishes of employees

BEFORE: D. E. Franks, Vice-Chairman, and Board Members M. J. Fenwick and E. C. Went.

***APPEARANCES:** Maurice A. Green and Les Dowling for the applicant; Christopher Eames, J. Graham Malcolm and D. Ross Ferguson for the respondent; John Wheat and Tim S. Nesbitt for the objectors.*

DECISION OF VICE-CHAIRMAN, D. E. FRANKS, AND BOARD MEMBER M. J. FENWICK; September 11, 1980

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4. There was filed in this application for certification a typewritten statement of desire to make representations dated July 10, 1980. The document reads in part:

“We, the undersigned, employees of Malcolm Condensing Company, St. George, Ontario on this date are submitting this letter in accordance with sections 3, 4 and 5 of the Labour Relations Act Form 5.

We oppose the application made by the United Food and Commercial Workers International Union for certification of a union for the said plant. We wish to explain our opposition at the hearing of July 25, 1980.”

There follows some thirty-seven signatures on a total of seven pages. At the hearing in this matter, the Board heard the evidence of Mr. John Wheat and Mr. Tim Nesbitt concerning the origination and preparation and circulation of the petition.

5. The petition was prepared by Mr. Nesbitt after some consultation with Mr. Wheat. Mr. Nesbitt wrote out the wording of the petition and the document was typed by his wife. The petition appears from its inception until the time it was posted to the Labour Relations Board to have been in the possession of Mr. Nesbitt at all times. Both Nesbitt and Wheat are truck drivers for the respondent employer. Wheat apparently drives a tractor trailer on trips mostly to Toronto, although to other locations as well. Nesbitt, on the other hand, makes local trips in the vicinity of St. George. The petition was apparently prepared by Nesbitt and his wife on the evening of July 9th. On Thursday, July 10th, Nesbitt and Wheat met after Wheat returned from a trip to Toronto at about noon and signed the petition. The bulk of the signatures on the petition were signed during the afternoon break in the lunchroom at the employer’s premises. Both Nesbitt and Wheat were there and both talked to various employees as they came into the lunchroom.

6. The evidence of Wheat is that shortly after he and Nesbitt had signed the petition, he went to the office and informed Mr. Malcolm and Mr. Ferguson, the managers of the respon-

dent, that a petition had been prepared and was about to be circulated. He was informed that he could not do this in the plant; in turn Mr. Wheat asked if they could use the lunch room and approval to use the lunchroom was given by the respondent employer. Thus, when Nesbitt and Wheat used the lunchroom as a place for signing up employees on their petition, they did so with the knowledge and consent of the respondent employer.

7. This in fact gave rise to a very curious incident. Nesbitt and Wheat apparently left the employer's premises sometime between 3:30 and 4:00 on the afternoon of Thursday, July 10th. When Nesbitt returned at about 5:00 p.m. to pick up his wife, she asked him to return to the plant with the petition, since there were a number of women who wanted to sign it and that they were waiting in the lunchroom. Nesbitt went home, then collected Wheat and they returned to the plant to the lunchroom. The evidence is clear that while Nesbitt and Wheat were meeting with the women in the lunchroom, a foreman came into the lunchroom to get something from one of the lockers in that area whereupon he was told by Wheat that there was a meeting going on and asked to leave. He apparently left without questioning these instructions.

8. The remaining signatures on the petition were signed up around midnight that evening. The evidence is that Wheat went to the plant and waited for Nesbitt in the supervisor's office and then they signed up the few employees who were there in the evening.

9. In cases where employees petition the Board objecting to an application for certification, the Board is careful to determine whether the petition represents the true wishes of the employees or whether the employer has interfered with the wishes of the employees. If the Board finds that the employer has played any part in the petition process, the Board will not allow such a petition to stand. In the present circumstances, it is clear that the employer knew the petition was being circulated and indeed gave permission to Wheat and Nesbitt to use the lunchroom. While mere knowledge of a petition is not sufficient to infer management interference in the wishes of the employees, the permission to use premises raises a serious problem. If the use of the premises by the employees circulating the petition is such that an employee is likely to conclude that the employer has agreed to such use, then that is a clear indication of employer support of the petition. In the present case, the mere fact that Wheat and Nesbitt, who are truck drivers, spent a large portion of the afternoon in the lunchroom with the petition, is surely enough to raise a suspicion on the part of the average employee that the employer was aware of what they were doing. Any doubt as to that suspicion was surely removed when Mr. Wheat asked the foreman to leave the lunchroom, and he did. It is clear that the foreman was prepared to co-operate with the activities of Wheat and Nesbitt. In such circumstances, we are prepared to find that the employer tacitly but quite openly indicated support for the petition such that we cannot find that it represents the true wishes of the employees. The Board, therefore, will give no weight to the petition in this case.

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11. A certificate will issue to the applicant.

DISSENT OF BOARD MEMBER E. C. WENT:

1. I dissent.

2. In my opinion the petition is valid and the petitioners have met the onus imposed on them by the Board to show that the signatures represent a free and voluntary expression of their wishes in this matter.

3. While it is true that the Company was aware of the circulation of the petition, there is no evidence that the petition was company-inspired. Indeed, the Company's response to information that a petition was being circulated was limited to telling the petitioners not to obtain signatures during working hours and to be sure to tell the truth when they came before the Board. This can hardly be construed as company support or involvement.

4. The petitioners, Wheat and Nesbitt, felt that they had management's acquiescence to use the lunchroom and in fact, obtained most of the signatures in that location. However, these signatures were not obtained in the presence of any management person and there is no reason to conclude that the signatories would believe that there was company involvement simply because the petition was available for signing in the lunchroom.

5. On one occasion a foreman did walk into the lunchroom to obtain something from a locker in that area. The petitioners, Nesbitt and Wheat, were discussing the petition with a few employees in the lunchroom at the time. The foreman was asked to leave and he did. There was no discussion about the petition in the foreman's presence. To suggest that the fact that a foreman, in the normal course of his duties, happened to go into the lunchroom where a small group of employees were holding a meeting, was asked to leave and did so, is sufficient evidence to invalidate the whole petition is, in my opinion, completely unjustified. In any event, only 4 of the 37 signatures were obtained at this meeting, 29 signatures having been obtained earlier and 3 later. While I do not agree that there was management's support in this case, if we assume there was it seems to me that it should apply only to the 4 signatures obtained at the meeting which was interrupted by the foreman and that the balance of the petition should stand.

6. To deny the employees a vote under these circumstances is, in my opinion, not justified by the evidence and will prove injurious to good labour relations at this plant.

1028-80-M The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, Applicant, v. **Casalbil Contractor Limited**, Respondent

Practice and Procedure – Section 112a – Witnesses – Witness failing to appear after being duly summoned – Board issuing warrant for arrest

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: Douglas J. Wray and Matt Whelan for the applicant; No one appearing for the respondent; Mauro Angeloni appearing for Toronto & District Carpentry Contractors Association.

DECISION OF THE BOARD; September 17, 1980

1. This is a referral of a grievance to arbitration by the Board under section 112a of *The Labour Relations Act*.

2. The hearing in this matter was scheduled to commence at 9:30 a.m. on the morning of September 16, 1980. No one appeared for the respondent at that time and in particular Mr. Dominic Casalnuovo, a witness summoned by the applicant, was not in attendance, nor was he present when the Board convened the hearing in this matter at 10:25 a.m. At that time, counsel for the applicant requested that the Board enforce a Summons to Witness, issued by the Board under *The Labour Relations Act*.

3. In proceedings under section 112a, the Board, by virtue of sections 92(2)(a), 112a(3) and 37(7) of *The Labour Relations Act*, has the power "...to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath...in the same manner as a court of record in civil cases." The Board is acting as an arbitrator when dealing with matters under section 112a of the Act. The enforcement mechanisms contained in sections 12 and 13 of *The Statutory Powers Procedure Act* are unavailable to the Board in these proceedings because *The Statutory Powers Procedure Act* does not apply to arbitrators under *The Labour Relations Act*. (See section 3(2)(d) of *The Statutory Powers Procedure Act*, and *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95*, (1979), 25 O.R. (2d) 8.) Thus, the enforcement of the Board's process is left entirely to the Board acting under the authority conferred upon it by *The Labour Relations Act*.

4. The Court in *Re: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95*, *supra*, stated at page 13:

"...the purpose of the proceedings under s. 112a was to provide a speedy process for resolving disputes arising out of the interpretation of collective agreements negotiated in the construction industry. It is unnecessary for us to answer the questions raised before us as to the appropriate procedures to be followed by the Board under s. 112a with respect to the issue of summonses or subpoenas and the enforcement thereof, but we are satisfied that the Act itself provides a method of enforcing the attendance of witnesses and the production of documents that could be applied with much greater speed in the case of a witness like Bittenbinder than is

involved in an application by way of stated case to this Court under s. 13 of the *Statutory Powers Procedure Act*, 1971.”

The Board is given the authority under the Act to enforce the attendance of a witness in the same manner as a court of record in civil cases. In Ontario, a court of record in civil cases has the authority to issue a warrant for the arrest of a person who has been duly served with a summons but has failed to appear. (See 26 C.E.D. (Ont. 3rd) 114-366, paragraph 673; Rule 275, Supreme Court of Ontario Rules of Practice.) The issuing of a warrant directed to the Sheriff to bring a person before the Board is to be distinguished from punishing a person for contempt committed in the face of the Board. The Board, in issuing such a warrant, is not punishing the witness for failing to attend. Indeed, it is our view that we cannot impose punishment for such action. (See *Re: Hawkins and Halifax County Residential Tenancies Board*, (1974), 47 D.L.R. (3d) 117 (N.S.S.C.).) Rather, it is ensuring that the witness attend before the Board to give evidence pursuant to a summons duly issued and served. However, should a witness refuse to testify after having been brought before the Board and after being directed by the Board to testify, such refusal may well constitute grounds for punishment by way of fine or imprisonment for contempt committed in the face of the Board. (See *Re: Diamond and Ontario Municipal Board*, [1962] O.R. 328; 32 D.L.R. (2d) 103.)

5. The Board may, therefore, enforce the attendance of a witness duly served with a summons and conduct money by issuing a warrant directing the Sheriff to arrest the witness and bring him before the Board if the party seeking such an order can establish that the witness was properly served with a summons and sufficient conduct money and that the presence of the witness is material to the ends of justice.

6. The person summoned by the applicant is Mr. Dominic Casalnuovo. The Board heard evidence from Mr. Matt Whelan, a business agent of the Carpenters District Council of Toronto and Vicinity of the United Brotherhood of Carpenters and Joiners of America, who is also a trustee on certain funds established pursuant to collective agreements between the applicant and the Toronto & District Carpentry Contractors Association. The grievance herein is in respect of certain monies payable under that collective agreement with respect to the Welfare Plan, Pension Plan and Vacation Pay plan therein. The evidence is that the respondent has failed to make the filings required by the collective agreement. The Summons To Witness requires that the witness bring certain documents with him to the hearing in this matter. The evidence which the applicant seeks to adduce through Mr. Dominic Casalnuovo relates to the liability of the respondent for violation of the collective agreement and to the actual amount of money owing to various plans. The Board is satisfied that such evidence is relevant and material to the case at hand and that the applicant requires such evidence in order to prove its case.

7. Mr. Whelan testified that a Summons To Witness, issued by the Board, directed to Mr. Dominic Casalnuovo dated the 2nd day of September, 1980, was personally served on Dominic Casalnuovo by Whelan on the 9th day of September, 1980 at 9:15 a.m. Mr. Casalnuovo was served at a job site on Parravano Court in North York, and in addition to the Summons To Witness, was given the sum of \$26 conduct money. Mr. Casalnuovo, having been properly served a Summons To Witness duly issued under *The Labour Relations Act*, and in reasonable time in advance of the hearing in this matter, failed to appear at the Board's hearing on the 16th of September, 1980.

8. In view of the foregoing, the Board is satisfied that the presence of Mr. Dominic Casalnuovo is material to the ends of justice. Therefore, the Board hereby issues a warrant for the arrest of Dominic Casalnuovo directed to the Sheriff of the Judicial District of York to

arrest and bring the said Dominic Casalnuovo before the Board at the continuation of its hearing in this matter at the Board's hearing rooms on the sixth floor of 400 University Avenue, in the City of Toronto, at 9:30 a.m. on the 24th day of September, 1980.

9. The hearing in this matter is adjourned to September 24, 1980, at 9:30 a.m.

2238-79-R Ontario Nurses' Association, Applicant, v. Charlotte Eleanor Englehart Hospital, Respondent

Employee – Head Nurse – Whether excluded as exercising managerial functions

BEFORE: R. D. Howe, Vice-Chairman, and Board Members Edward J. Brady and W. F. Rutherford.

DECISION OF THE BOARD; September 8, 1980

1. By decision dated March 27, 1980, the Board certified the applicant under section 6(1a) of the Act as the bargaining agent for the full-time and part-time bargaining units described therein, pending final resolution of the composition of the bargaining units. In that decision, the Board also noted that the dispute between the parties with respect to the bargaining unit was as follows:

“The applicant contends that only the Director of Nursing and persons above the rank of Director of Nursing should be excluded from the bargaining unit. The respondent, on the other hand, proposes the following exclusions: Head Nurses, persons above the rank of Head Nurse, Employee Health Nurse, Infection Control Officer, In-Service Co-ordinator, Discharge Planning Co-ordinator, and Registered and Graduate Nurses employed for less than 24 hours per week.”

In view of the dispute concerning the bargaining unit, the Board appointed Mr. N. Wilson, Labour Relations Officer, to inquire into the list and composition of the bargaining unit and report to the Board thereon.

2. The parties met with the Labour Relations Officer and entered into a written agreement to proceed on the following basis:

“1. The classification of ‘Supervisor’ is an agreed exclusion from the bargaining unit: Namely:

Schedule ‘A’	#10	Ophof Margaret
Schedule ‘B’	#23	Rothera Irene
Schedule ‘D’	# 2	Freer Shirley
	# 4	Hannon Norma
	# 5	Hasson Agnes
	#10	Parker Helen

And also excluding the classification of Employee Health Nurse, currently performed by #10 Parker Helen.

2. The parties are in dispute regarding the classifications of Head Nurse and In-Service and Discharge Planning Co-ordinator. Two classifications only. The parties agree the testimony of Mrs. Dorinne Garrett shall be representative of herself and of all other Head Nurses affected by this application.”

3. Following his meeting with the parties, the Labour Relations Officer submitted his report to the Board. The Board also received written submissions from each of the parties with respect to the report. The parties indicated in their respective written submissions that they did not request a hearing before the Board in this matter.

4. The respondent contended that the two classifications remaining in question, namely, “Head Nurse” and “In-Service and Discharge Planning Co-ordinator”, should be excluded pursuant to section 1(3)(b) of the Act.

5. In the recent decision of *The Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. March 304, the Board described the purpose and scope of section 1(3)(b) as follows:

“3. Section 1(3)(b) of the Act reads as follows:

‘1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.’

In making determinations under section 1(3)(b) of the Act, the Board has continually recognized that effective collective bargaining necessitates an arm’s length relationship between employees on the one hand and management on the other. The managerial exclusion in section 1(3)(b) is designed to exclude from the definition of “employee” those persons who, because of the exercise of managerial functions, would be placed in a conflict of interest if they were included in the bargaining unit and allowed to engage in collective bargaining. The Board must assess the facts of each case to determine whether the duties and responsibilities in question have true managerial significance.

4. When assessing a professional person such as a registered nurse, the Board must distinguish between duties which emanate from an individual’s professional training and duties which in fact reflect a managerial function....”

6. The approach which has been adopted by the Board in applying section 1(3)(b) to Head Nurses was described as follows in *Westmount Hospital*, [1976] OLRB Rep. Feb. 24:

“8. The Board has, on a number of occasions, dealt with the application of section 1(3)(b) to head nurses and has, in the course of its deliberations,

developed certain insights which are helpful in applying the facts at hand. In the *Peterborough Civic Hospital* case, Board File No. 1970-72-R, the Board, in discussing a number of the functions of head nurses, stated:

‘Head nurses form a link or a liaison between management and other employees; they are in charge of a hospital floor and therefore assume many different functions. For example a head nurse is still involved in patient care. Because of her experience she may be called upon by other nurses prior to consulting the doctor. She may also be required to assist in the orientation of nurses who are new to that particular floor. *Neither of these roles is a managerial function, but is merely the function of the training and experience of head nurses.* In addition, the head nurse carries out limited administrative duties. For example, she co-ordinates the policies of the hospital on her floor with respect to staffing. She sees that the scheduling and arranging of personnel is such that there is adequate coverage for patients. This scheduling is carried out in correspondence with a predetermined policy and the head nurse merely implementing policies decided at a higher level. *This implementation should not be confused with the decision-making control function that goes hand in hand with management.*

Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to ‘keep its ear to the ground’ and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, *this reporting function should not be confused with the exercise of managerial duties.*’ (Emphasis is added)

9. The Board in distinguishing between managerial criteria as applied to professional or semi-professional employees and as applied to others, stated in the *Essex Health Association* case [1970] OLRB Rep. November 824:

‘Professional or semi-professional employees such as head nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons’ professional or technical skills. While nurses may give certain directions to others, e.g., orderlies, in the exercise of their professional skills, these directions are not dissimilar to the directions given by a journeyman to an apprentice in other crafts. Again, the reporting functions exercised by head

nurses in this case may be likened to the reports one may expect from a journeyman concerning the progress of the apprentice.'

10. Finally, the Board has taken further notice of the requirement for co-ordination of patient care as administered by doctors, nurses, nursing assistants, orderlies, dieticians and therapists etc. and has stated in the *Toronto East General* case [1974] OLRB Rep. October 671:

'Hence there is a tremendous need to co-ordinate the professional and technical activities of nurses and to this end elaborate policy formulations are communicated to them, and a specialized group of co-ordinators has been created. This group of co-ordinators includes supervisors, head nurses, assistant head nurses, charge nurses and graduate nurses on occasion. Whether any in this group of co-ordinators exercises managerial functions, as well as performing a co-ordinating function, is a question that must be decided on a case by case basis, and any inquiry must consider whether the inclusion of such people would have a serious effect on the labour relations of the particular institution before the Board.'

(See also *St. Peter's Hospital — Hamilton*, [1975] OLRB Rep. March 247; and *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283.)

7. As indicated above, the parties have agreed (in accordance with paragraph 8 of the Board's Practice Note No. 4) that the testimony of Dorinne Garrett shall be representative of the duties and responsibilities of herself and all other persons in the Head Nurse classification. Mrs. Garrett is the Head Nurse on the Obstetrics floor of the Hospital. She reports to Helen Parker, the Day Supervisor, who in turn reports to Helen Havlick, the Director of Nursing. Mrs. Garrett devotes forty per cent of her time to direct nursing care such as answering bells, helping patients on and off bed pans, helping to turn patients, moving trays, and helping to make beds. She spends another twenty per cent of her time performing "ward clerk work", which is essentially paperwork (such as making up requisitions, starting new charts, assembling charts after patients have been discharged, and obtaining laboratory requisitions) and administrative work (such as making dental appointments for patients and contacting nursing homes on behalf of patients). Although the job description of the position filed as an exhibit by the respondent describes a Head Nurse as a "Registered Nurse assigned the responsibility and supervision of nursing service within a single unit of an agency" and includes in the list of functions of that position "[a]ssisting in the development and implementation of methods by which objectives of the nursing unit can be realized, i.e. — plan of organization, definition of job descriptions, function of personnel, performance evaluations, recommendation of appointments, transfers and promotions, planning and implementing of in-service programs, interpreting established policies and standards, planning for evaluation of existing total nursing program and unit program", the evidence concerning the job functions actually performed by Mrs. Garrett indicates that, in the remaining forty per cent of her time, she performs primarily a co-ordinating function rather than a managerial function. Although Mrs. Havlick testified that she intended Head Nurses to have disciplinary powers and for that reason circulated in September of 1977 a document entitled "Guidelines for Disciplinary Procedure", Mrs. Garrett testified that she did not have the authority to discipline employees. When asked if she could give a written reprimand, she stated: "No, I wouldn't do that. I would go to Mrs. Parker." In fact, the Obstetrics floor appears to be an employment setting of the type described in the

Toronto East General case (*supra*, at paragraph 12) in which employees are so highly trained and work so closely together that little, if any, labour relations supervision is needed. Mrs. Garrett merely engages in “on-job counselling” by providing suggestions and advice based on her experience and professional expertise. She does complete annual evaluation forms for employees on her floor but this is done by rating their nursing skills on the basis of predetermined “benchmark” criteria. She makes no recommendations with respect to what action should be taken as a result of the reports. She is rather uncertain concerning the use which is made of the forms after she gives them to Mrs. Parker.

8. Mrs. Garrett attends a Department Head Meeting once a month along with the other Head Nurses and Department Heads from other areas of the Hospital. The purpose of those meetings is to permit Mr. Miller, the Administrator, to communicate directions and plans of the Board of Directors. The meetings also provide the Head Nurses with an opportunity to discuss problems of concern to them. The Administrator then decides what the answers to the problems are. Salaries and the Hospital budget are also discussed at those meetings but this discussion also appears to be information oriented rather than decision oriented as, in the words of Mrs. Havlick, “...many of these things are imposed by the Ministry or imposed by an arbitrator or imposed by someone completely outside of the Hospital organization so...the ability to make a decision as to whether you will increase anyone’s salary or not is pretty difficult for anyone to make at this point in time.” Mrs. Garrett also attends Supervisors and Head Nurses Meetings at which Supervisors and Head Nurses discuss problems and offer suggestions concerning possible solutions based on their experience and professional expertise.

9. Mrs. Garrett has no authority to grant time off, authorize payment for overtime, schedule vacations, hire employees, transfer employees, or obligate the Hospital to a financial investment. If she wants any time off, she must “go through Mrs. Parker”. Her only involvement in the preparation of the annual budget is giving the Director of Nursing a list of the needs of her floor. It was her evidence that some of those requests are granted but others are denied. She is not involved in establishing the rates of pay for employees on her floor nor is she able to effectively recommend any increases in their wage rates. She refers to the Day Supervisor employees who have complaints about the operation of the Hospital or the treatment they are receiving from the Hospital. She is empowered to explain written Hospital policy but does not “make final decisions on anything that isn’t already written down.”

10. Mrs. Garrett acts as a conduit between the employees on her floor and the management of the Hospital and as a co-ordinator of her floor. However, she has no real authority to exercise independent decision-making responsibilities or make effective recommendations relating to terms or conditions of employment. Accordingly, having regard to all of the evidence and the submissions of the parties, the Board is of the opinion that she does not exercise managerial functions and is not employed in a confidential capacity in matters relating to labour relations.

11. We are also of the opinion that Earlene Butler, In-Service Co-ordinator and Discharge Planning does not come within the ambit of section 1(3)(b). Miss Butler reports to the Director of Nursing. Her primary functions are the training of new employees who are “brought in by Mrs. Havlick”, ensuring that employees have opportunities for continuing education within the Hospital (by instructing employees herself or arranging for the seller of a particular piece of equipment to give in-service training sessions), and co-ordinating the discharge of patients from the Hospital by contacting outside organizations (such as V.O.N., Homecare, and Public Health) for those patients who will require outside assistance after they leave the

Hospital. She familiarizes prospective employees with Hospital policies and procedures and provides Mrs. Havlick with an "informal report" concerning the level of some of their nursing skills, but the actual decision of whether or not to hire such persons is made by Mrs. Havlick. Miss Butler's reporting function is somewhat analogous to the reporting by an experienced journeyman concerning the progress of an apprentice (see *Essex Health Association, supra*, at paragraph 3). Staff nurses perform a similar function for newly hired personnel during the probationary period.

12. Miss Butler receives the evaluation forms prepared by Head Nurses but uses them not to discipline employees nor to otherwise adversely affect terms or conditions of employment, but rather to provide employees with opportunities for in-service training in their areas of weakness. Although she has access to employee files, she has never actually used them. She does not supervise any employees and has nothing to do with setting salary levels, granting time off, scheduling vacations, assigning work, disciplining employees, transferring employees or preparing the Hospital budget. She has no budget of her own and is not replaced on days when she is absent. Her role at the Head Nurses and Supervisors Meetings is informational and advisory. The occasional discussion of employee evaluations at those meetings is directed toward determining the areas in which staff are weak so that in-service training sessions can be arranged to remedy the weaknesses.

13. Accordingly, having regard to all of the evidence, the submissions of the parties, and the aforementioned agreement of the parties, the Board finds the following to be units of employees of the respondent appropriate for collective bargaining:

BARGAINING UNIT #1

All Registered and Graduate Nurses employed in an nursing capacity by the respondent in Petrolia, Ontario, save and except supervisors, persons above the rank of supervisor, employee health nurse, and persons regularly employed for not more than 24 hours per week.

BARGAINING UNIT #2

All Registered and Graduate Nurses regularly employed in a nursing capacity for not more than 24 hours per week by the respondent in Petrolia, Ontario, save and except supervisors, persons above the rank of supervisor, and employee health nurse.

• • •

15. A certificate will issue to the applicant with respect to bargaining units #1 and #2.

0599-80-R International Union of Operating Engineers, Local 793,
Applicant, v. **Cooper's Crane Rental Limited**, Respondent

Bargaining Unit – Employees working in construction and non-construction for same employer – Union seeking certification for non-construction work – Employer requesting separate full and part-time Units – Board not splitting full and part-time units – Same community of interest for both groups

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members M. A. Ross and J. A. Ronson.

APPEARANCES: *J. Redshaw and G. Palanuk for the applicant; and R. C. Filion and K. Gregg for the respondent.*

DECISION OF THE BOARD; September 15, 1980

1. This is an application for certification.
2. The Board finds the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The respondent, as its name suggests, is involved in the crane rental field. Its cranes are operated by members of the applicant trade union, who, when they are so engaged, are covered by a provincial collective agreement which is binding upon both the applicant and the respondent. When employees are not required for crane operating purposes, the respondent generally assigns them to the driving of floats. A float is a type of truck which is used to transport equipment to and from job sites. When engaged in such work, the respondent pays the employees at a lower rate than when they are operating cranes on the grounds that they are not working under the terms of the provincial collective agreement. The applicant accepts that employees engaged in the driving of floats are not employed under the terms of the collective agreement. The applicant submits, however, that by way of this application it is entitled to acquire bargaining rights with respect to the respondent's employees when they are engaged in the driving of floats.
4. The respondent takes the position that most of its employees affected by this application are already covered by a collective agreement and accordingly it would be inappropriate to issue a new certificate with respect to them. In the respondent's view, the applicant rather than bringing this application should instead be seeking to have the terms of the provincial agreement altered to as to provide for a new classification of float operator. We do not regard the provincial collective agreement as a bar to this application. On the material before us, we are satisfied that when engaged in the driving of floats the respondent's employees are outside the bargaining unit covered by the agreement and also without any formal union representation. In these circumstances we see no hindrance to awarding the applicant the bargaining rights which it is requesting.
5. The respondent also opposes the application on the grounds that the application was filed pursuant to the regular and not the construction industry provisions of the Act. It is the respondent's contention that the driving of floats comes within the construction industry. For its part the applicant contends that the driving of floats is outside the construction industry. In our view, it matters not for the purposes of this application whether the driving of

floats is, or is not, within the construction industry. The Board's consistent practice has been to allow applications for certification relating to the construction industry to be filed under the general provisions of the Act, and to treat such applications as it would any other application not filed under the construction industry provisions. (See: *Rexdale Heating Limited*, [1974] OLRB Rep. March 11).

6. At the hearing, counsel for the respondent indicated that if the application was to be treated as a non-construction industry application, then it might be appropriate to split the applied unit for bargaining into two, the division line being whether employees were engaged in the relevant work for more or less than 24 hours per week. The Board's general practice of placing employees who regularly work for not more than 24 hours per week in a separate bargaining unit is based on the assumption that full and part-time employees have a different community of interest. In this case, however, it appears that most if not all of the employees who would come within the applied for bargaining unit work for the respondent on a full-time basis. The only differing factor is the number of hours which they work for the respondent outside the scope of the existing provincial agreement. In our view, in the circumstances present here, to split the applied for bargaining unit into two on the basis of a 24 hour dividing line would not further any legitimate industrial relations purpose but would merely serve to further fragment the respondent's bargaining structure. Accordingly, we are not prepared to split the applied for bargaining unit into two.

7. In its filing, the respondent requested that students employed during the school vacation period be excluded from the bargaining unit, and also indicated that at the time of the filing of the application it employed one such student. In accordance with its normal practice in such circumstances, the Board is prepared to accede to the respondent's request.

8. Having regard to our conclusions set out above, and the bargaining unit descriptions proposed by the parties in their filings, the Board finds that all employees of the respondent working at or out of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons covered by a subsisting collective agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers' Employee Bargaining Agency constitute a unit of employees appropriate for collective bargaining.

9. The applicant challenged the list of bargaining unit employees filed by the respondent. In these circumstances the Board appoints Mr. C. Wheatley, Labour Relations Officer, to inquire into and report back to the Board on the list and composition of the bargaining unit.

0453-80-U Herbert Jennings, Complainant, v. Corporation of the City of Toronto and The Canadian Union of Public Employees, Toronto Civic Employees Union, Local Union 43, Respondents

Practice and Procedure – Section 79 – Respondent demanding particulars – Complainant obtaining adjournment on terms – No particulars filed – Board dismissing complaint under Rule 46

BEFORE: N. B. Satterfield, Vice-Chairman.

DECISION OF THE BOARD; September 12, 1980

1. In this complaint filed under section 79 of the Act, the Board issued a decision on July 11, 1980, which dealt with certain preliminary issues which had been raised at a hearing on July 9, 1980, one of which was a request of the complainant for an adjournment.

2. The Board granted the adjournment on conditions which were set out in paragraph 6 of that decision and which are quoted in full below:

“6. Consent for adjournment is granted on the following conditions:

- (a) the complainant is to supply in writing to the Board and each respondent the full particulars of his complaint including the section or sections of the Act which he alleges the respondents to have violated and the concise statement of the material facts, actions and omissions of the respondents upon which he intends to rely for sustaining the complaint; in this respect the Board draws the complainants [sic] attention to section 47(1) of its Rules of Procedure; and
- (b) that the complainant advise the Registrar not later than 30 calendar days from the date of this decision that he has complied with the requirements in item (a) of this paragraph and is ready to proceed with the complaint.

Should the complainant fail to contact the Registrar in accordance with item 6(b) above, the Board will apply section 46(1) of its Rules of Procedure which provides [sic] as follows:

‘Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.’ ”

3. A copy of the Board’s decision was sent to the complainant on July 29th together with a formal Notice of Hearing. The hearing, which was scheduled for Monday, August 25, 1980, was cancelled by the Board because no particulars had been filed with it. As of the date of this decision, the complainant has not advised the Registrar that he has supplied each respondent with particulars in writing as stipulated in paragraph 6, item (a) of the Board’s decision referred to above.

4. The complaint alleges violation of section 79 of the Act, a procedural section which does not create any rights which of themselves could be the basis of an offence under the Act. Furthermore, the complaint contains no allegation of conduct by either respondent which, if proven, would establish that any section of the Act had been violated. Accordingly, the complaint fails to establish on its face any grounds for the remedy requested and it is dismissed.

0150-79-R; 0153-79-R Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261, Applicant, v. Fuller's Restaurant, Respondent, v. Group of Employees, Objectors.

Certification – Evidence – Petition – Witness unavailable – Union filing written statement – Whether admissible – Petition prepared in employees home – No evidence of management support – Failure to lead evidence of delivery of petition to Board – Whether petition acceptable

BEFORE: Kevin M. Burkett, Alternate Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *Alick Ryder Q.C. for the applicant; C. E. Humphrey and M. Lalonde for the respondent; Michael Gordon, Carmen Fisher, Marion Eveline and Bonnie Bellefeuille for the objectors.*

DECISION OF THE BOARD; September 30, 1980

1. These are applications for certification filed on April 23, 1979. These matters were first heard and consolidated by the Board on May 14, 1979. In a decision dated May 28, 1979 the Board found that the applicant union was a trade union within the meaning of the Act and having regard to the agreement of the parties found that

all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1),

and that

all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

2. At the hearing held on May 14, 1979, the Board refused to consider a relevant and timely statement in opposition to the trade union because it did not, on its face, express clear opposition to the certification of the applicant trade union. By its decision dated May 28, 1979, the Board certified the applicant. The objectors sought judicial review of the Board's decision and by a judgement dated March 11, 1980, (reported at 80 CLLC ¶14,021) the Supreme Court of Ontario quashed the Board's initial decision. The Court held that the Board erred when it refused to allow the petitioners to call oral evidence to substantiate the desire of the petitioners to object to the union's certification. The Court did not expressly remit the matter back to the Board and an issue arose as to whether the proceedings had been quashed in their entirety, thereby requiring fresh applications to be filed, or whether only that part of the Board's decision which was in error had been quashed, thereby requiring the Board to proceed with the initial applications from the point at which the error had been made. In a decision dated June 2, 1980, [1980] OLRB Rep. June 828, the Board concluded:

"19. An order quashing an administrative tribunal's decision might definitely dispose of a matter before that tribunal where the very subject matter of the proceeding is beyond the tribunal's jurisdiction as determined by the Court or where a tribunal has so misconducted itself that a fair subsequent hearing cannot occur. Neither of these situations prevail in the instant case. Rather, the failure of the Court to remit the matter to the Board reflects the fact that the objecting employees did not seek this relief and the Court would have been satisfied that the matter could be continued if this is what the applicant trade union wished. Moreover, the absence of additional directives from the Court is a good indication that it did not think the Board needed to adopt a particularly different approach in continuing to deal with the outstanding applications. However, the Board has decided to change the composition of the panel out of an abundance of caution and given the representations of counsel for the objecting employees."

3. These matters were scheduled for continuation of hearing in Ottawa on August 14 and 15, 1980. The respondent company argued at the outset that because of the passage of time and the turnover of staff, the Board should dispense with the hearing of evidence into the voluntariness of the petition and exercise its discretion under the Act to direct the taking of a representation vote. In rejecting the respondent's submissions, the Board ruled that because of the need for certainty and finality in certification matters and to guard against the prejudicial effects of delay, the terminal date is established under the Act as the date as of which employee desires are assessed for purposes of certification. The Board expressed its intent to put the parties in the position they would have been had the Board not erred in May, 1979.

4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining units #1 (full-time bargaining unit) and #2 (part-time bargaining unit) at the time the application was made, were members of the applicant on May 2, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. In the absence of a relevant and voluntary statement of desire in opposition to certification (a petition), the Board normally certifies without the taking of a representation vote where, as in this case, the union demonstrates membership support in excess of fifty-five per

cent of those in the bargaining unit. A statement purportedly in opposition to the trade union was filed with the Board in this matter. The statement bears the signatures of a sufficient number of persons who also signed union cards, such that if there is no evidence of a reaffirmation of union support prior to the terminal date by those who also signed both union cards and the petition, and the petition is proven to be voluntary, the Board will direct the taking of a representation vote in both bargaining units. However, an employee in the part-time bargaining unit (bargaining unit #2) signed a statement revoking his signature on the petition (a revocation). The revocation was filed prior to the terminal date. It is relevant in that if it is proven to be a voluntary expression, thereby causing the Board to disregard the employee's signature on the petition, the number of persons evidencing opposition to the certification of the union as bargaining agent for the part-time employees will not be sufficient to cause the Board to direct the taking of a representation vote in the face of the more than fifty-five per cent membership support evidenced by the union. The Board's usual practice in these circumstances is to hear evidence in support of the voluntariness of the revocation before considering the statement in opposition to the trade union. If the revocation is proven to be voluntary, the Board will then exercise its discretion under section 7(2) of the Act and certify the trade union as bargaining agent of those in the part-time unit without a vote.

6. The names of those who signed the petition and of the person who also signed the revocation were divulged during the course of the judicial review. Mr. Dennis Dupuis, a part-time employee of the respondent at the time the applications were filed, signed the revocation. He is no longer an employee of the respondent and his whereabouts is unknown. Ms. Eleanor Dunn, a business agent with the applicant trade union, drafted and was present when Mr. Dupuis signed the letter reaffirming his support for the trade union. We are satisfied on her uncontradicted evidence that the statement of reaffirmation represents a voluntary expression of Mr. Dupuis' wishes and, accordingly, we hereby exercise our discretion under section 7(1) of the Act and certify the applicant trade union as bargaining agent for

all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, and office staff.

7. Turning to the statement of desire in opposition to the trade union. The statement bears a sufficient number of signatures of those in the full-time unit such that if it is proven to be a voluntary expression of opposition to the trade union by those who signed, the Board will follow its usual practice and exercise its discretion under section 7(2) to direct the taking of a representation vote among those in the full-time unit. The onus is upon the objectors to establish the voluntariness of the petition.

8. Miss Marion Eveline, Mrs. Bonnie Bellefeuille and Miss Carmen Fisher, all full-time employees of the respondent, testified in support of the voluntariness of the statement. Miss Fisher explained that she was approached on more than one occasion by the union organizer and agreed to sign a union card when the union organizer visited her residence. She testified that she was assured by the organizer that her card would be returned to her should she change her mind. She testified that a few days after signing she did in fact change her mind. It is her uncontradicted evidence that when she asked the organizer for the return of her card, she was rebuffed. She testified that from this point she assumed an active role in opposition to the trade union and enlisted the support of Miss Eveline. Miss Eveline works as a full-time cook at the

restaurant and also as a full-time cook at an Ottawa hospital. She is represented by another union at the hospital. She made known her opposition to the trade union from the outset. It is her evidence that she was approached by the president of the hospital local and told that if she continued to oppose the trade union attempting to be certified at the restaurant she might lose her membership in the hospital local, which would result in her termination at the hospital. She informed her supervisor at the hospital of the conversation and was referred to the director of personnel. The director of personnel referred her to Mr. Gordon, who was retained as counsel for the objectors. Mr. Gordon had acted for a group of paramedical employees in their negotiations with the hospital.

9. The petition was drafted by Miss Fisher on Tuesday, May 1, 1979; the day prior to the terminal date and four days after the posting of the notice of hearing. Miss Eveline and Miss Fisher called a meeting of all of the employees of Fuller's for the evening of Tuesday, May 1st at Miss Eveline's apartment. Her apartment was located across the street from the restaurant. Employees were notified by word-of-mouth or by telephone. There is no evidence of employer involvement in the arranging of the meeting. Miss Fisher testified that the purpose of the meeting was to discuss the "pros and cons" of the trade union and for this reason the known union supporters were invited. Both Mr. Andy Konecny and Mr. Dwayne Benjamin, who testified on behalf of the union, were invited and attended at the meeting. Indeed, a union representative appeared and was allowed to enter and answer questions from employees. The evidence is that the meeting developed into somewhat of a "free for all" at times with everyone speaking at once. Concern was expressed by some employees to the reaction which might be expected from the company if the employees joined a trade union. Mention was made of the possibility of the company closing down or taking other reprisals. However, these comments were made by employees and there is no suggestion that they were management inspired. After the discussion had run its course, Miss Fisher wrote the words

"Fullers [sic] Restaurant Richmond Rd. Ottawa

May 1/79

The undersigned people are petitioning the Hotels, Clubs, Restaurants,
Taverns Employees Union Local 261."

on a sheet of paper and, with exception of two employees, those who signed the statement did so in Miss Eveline's apartment as the meeting was breaking up. The remaining two employees signed the statement the next morning in front of Miss Eveline's apartment. They could not attend at the meeting the previous evening and had arranged to meet Miss Eveline the next morning. The union conceded that all those who signed the statement did so in the knowledge that they were signing a document in opposition to the certification of the applicant trade union.

10. Following the meeting Miss Fisher, Miss Eveline and a number of other employees who had been present went across the street to the restaurant. It is their evidence that they did so for the purpose of having a cup of coffee and something to eat. The union filed with the Board a statement signed by a Mr. Dennis Dupuis, the same employee who signed the revocation, which states that he saw both Miss Fisher and Miss Eveline enter the manager's office after returning to the restaurant and heard Miss Fisher say to the district manager who was in the restaurant at the time, "We've done it." The statement was signed on May 1, 1979. Mr. Dupuis did not appear to testify and subject himself to cross-examination. As has been noted, he no longer works for the respondent, and the union explained that because of the passage of time it had

lost track of Mr. Dupuis' whereabouts and consequently had been unable to advise him of the hearing in this matter. Both Miss Fisher and Miss Eveline denied that they had discussed the statement of desire with the district manager or anyone else from the management of the company. They testified that it is not unusual for the district manager to be in the restaurant on any given evening. It is their evidence that employees of the restaurant regularly receive telephone calls in the restaurant office and that Miss Eveline received a personal call on the office phone after they returned to the restaurant following the meeting at Miss Eveline's apartment. While both girls went to the office, they deny that the district manager was present or that they discussed the petition with him.

11. If the evidence establishes that Miss Fisher and Miss Eveline informed the district manager that they had "done it" after returning to the restaurant following the signing of the petition, we would be hard pressed to conclude that the petition was other than management inspired. In this case, however, we must choose between the oral evidence of Miss Fisher and Miss Eveline (who were subject to cross-examination) and the signed statement of Mr. Dupuis who was not present at the hearing. Having regard to the passage of time, the Board allowed the statement to be placed in evidence. However, the Board is not prepared to accept the statement in preference to the oral testimony of the two witnesses for the objectors. This is especially so where, as in this case, the evidence establishes that the person who signed the statement upon which we are being asked to rely, attempted to secure a sum of money from the objectors prior to the initial hearing in return for his undertaking not to attend at the hearing. We are not satisfied on the evidence that either Carmen Fisher or Marion Eveline advised the district manager, or anyone else from the management of the company that they had successfully circulated a petition in opposition to the trade union.

12. In the course of the Board's examination of Miss Eveline, it was revealed that Mr. Ken Peskett was present at the employee meeting held at Miss Eveline's apartment to discuss the "pros and cons" of union representation. Mr. Peskett occupied the position of shift supervisor at the time and considerable evidence was led as to the nature of his duties and responsibilities. The union witnesses testified that they considered Mr. Peskett to be a managerial employee with a significant measure of control over their employment relations. The objectors' witnesses described Mr. Peskett as a senior employee or "lead hand" type who performed duties which were also performed by other bargaining unit employees from time to time. The evidence establishes that on certain shifts Mr. Peskett was responsible for signing employees in, supervising employees, answering customer complaints and maintaining custody of the cash. He also cleaned tables, washed dishes and performed other bargaining unit work. The union witnesses maintained that he had the power to discipline or at least to recommend discipline. However, the specific incidents which were cited do not establish the authority of Mr. Peskett to discipline. For example, Mr. Dwayne Benjamin, who worked as a busboy, testified in support of his contention that Mr. Peskett had the authority to discipline, that Mr. Peskett once told him not to mop in the front when customers were present. The objectors' witnesses described Mr. Peskett's function as "baby sitting"; a function also done by other bargaining unit employees from time to time. Mr. Peskett, although present at the employee meeting, did not play an active or leading role in the discussion which took place.

13. If it is found that Mr. Peskett occupied a managerial position or was perceived by the other employees as a managerial person, then his presence at the employee meeting at which the petition was signed may have had the effect of thwarting voluntary expression. The Board has long held that because of the responsive nature of the employer/employee relationship the involvement of a person perceived to be managerial in the preparation or circulation

of a petition may impair the free expression of those who, after having signed union membership cards, change their minds and sign a statement opposed to the trade union. (See *Re Leamington Vegetable Growers*, [1974] OLRB Rep. June 402.) The evidence with respect to Mr. Peskett's duties and responsibilities falls short of establishing that he occupied a managerial position within the meaning of section 1(3)(b) of the Act. The evidence with respect to the employee perception of his role, however, is conflicting. The witnesses for the intervener maintained that Mr. Peskett was not viewed as a managerial employee. The witnesses for the union, on the other hand, claim that he was seen as a managerial employee. We have resolved this conflict in favour of the objectors. We are not satisfied on the evidence that Mr. Peskett would have been perceived by the employees generally as a managerial person with meaningful authority over their employment relations. Furthermore, the parties to this matter agreed to the description of appropriate bargaining units at the initial hearing in May, 1979 and these are set out in the Board's decision dated May 28, 1979. Their agreement in this regard was made at a time when the issue of Mr. Peskett's influence on the voluntariness of the statement in opposition to the union had not been identified. The union agreed at that time that the line of managerial exclusion should be drawn at the assistant manager level so that only "the assistant manager and persons above the rank of assistant manager" were excluded from the bargaining units. The union agreed to the inclusion of the shift supervisor in the full-time bargaining unit. To reiterate, we are not satisfied that the shift supervisor was perceived by the employees in the bargaining unit as a managerial person. Accordingly, the attendance of Mr. Peskett at the employee meeting held on Tuesday, May 1, 1979 did not impair the free expression of those who attended.

14. The notice of hearing in this matter was first posted at the employer's premises on Friday, April 27, 1979; four days prior to the employee meeting held at Miss Eveline's apartment. A meeting of employees was called by the company on the afternoon of Friday, April 27th. There was no prior notice of the meeting, although Miss Fisher testified that she had heard rumours in advance that Mr. Fuller would be visiting. The restaurant was closed from 2:00 p.m. to 5:00 p.m. Mr. Stan Fuller, the owner of the restaurant, who operates from an office in Vancouver, along with management representatives from both the Toronto and Ottawa offices of the respondent were present. This was not the first time that Mr. Fuller had taken part in an employee meeting at the company's Ottawa restaurant, nor was it the first time the restaurant had been closed for an employee meeting. The evidence establishes that the restaurant had introduced a "specials promotion" and the first two to two and one-half hours of the April 27th meeting were taken up with discussions concerning the menu, the method of preparation and the mechanics of the incentive system as related to "specials". The company was offering the waitresses credit for a certain number of miles per special ordered (other employees were to be credited with a proportionate number of miles) which could be exchanged for air fare equivalent to the number of miles acquired. Sometime after 4:00 Mrs. Bonnie Bellefeuille asked Mr. Fuller to comment on the "union business". The evidence of all witnesses (both union and objectors) establishes that Mr. Fuller said that one way of dealing with employment problems was to bring in a union. He told the employees he could say no more and one of the persons with him read a prepared statement to the effect that the company could not become involved but advised employees to read the posted notices carefully. The employees then asked if they could have a few minutes to discuss the matter. The company officials withdrew but returned ten minutes later to advise that the restaurant was being reopened to the public.

15. Again, having regard to the responsive nature of the employer/employee relationship, this Board has held that a "captive audience" meeting held by management during the course of a union organizing campaign may serve to thwart free expression. This is so where

the employer, relying upon his position of economic dominance, uses the employee meeting to threaten, coerce, or create unjustified concerns in the minds of his employees with respect to job security. (See *New Ontario Dynamics Limited*, [1975] OLRB Rep. Nov. 845 for a review of the Board's jurisprudence on this area.) While the Board has traditionally looked with suspicion upon the holding of an employee meeting prior to the circulation of a petition against the trade union, not all such meetings are found to have the effect of thwarting free expression. In *G.T.E. Sylvania*, [1979] OLRB Rep. July 663, the plant manager addressed the company's employees following notice of an application for certification, asked the employees to carefully consider because it affected all of them, and expressed disappointment that they considered it necessary to formalize the employer/employee relationship by joining a trade union. The Board found that these remarks were within the bounds of legitimate free expression and did not intimidate or coerce the employees who attended. The Board in this case is being asked by the union to conclude that the meeting called by the company on April 27th had the effect of thwarting free expression so that the signatures which were subsequently affixed to the statement of desire do not represent a voluntary expression of those who signed.

16. We are satisfied that the meeting which was held on company premises on April 27, 1979 was called by the company to deal with the "specials promotion". Similar types of meetings had occurred in the past. The question of unionization was raised by an employee some two hours after the commencement of the meeting. The company did not initiate the discussion and the comments made by Mr. Fuller and the content of the prepared statement were well within the bounds of legitimate expression. (See *Re G.T.E. Sylvania*, *supra*.) In this case the company said no more than that a union was one way to deal with employment problems and suggested to employees that they carefully read the posted notice. The time given to the employees at the end of the meeting to discuss the matter privately did not affect the subsequent ability of the employees present to make a free choice. There is no evidence that the company had established a liaison with anti-union supporters. The company responded to an employee request and allowed all employees (both those for and against the union) to meet privately for a few minutes. We are satisfied that the meeting which took place on April 27th on company premises and during working hours did not have the effect of undermining the voluntariness of the statement of desire.

17. Custody of the petition was given over to Miss M. Palmateer after the last signature had been affixed to it. Miss Palmateer signed an affidavit filed by the objectors in support of its application for judicial review of the Board's initial decision which states that she mailed the statement to the Board. Miss Eveline testified that she received the registration slip from Miss Palmateer prior to the initial hearing. The registration slip was filed in evidence. Miss Palmateer no longer works for the respondent company and did not appear to testify. The objectors explained that although they had discovered Miss Palmateer's new place of work shortly before the hearing, she was absent on vacation. A message was left with her new employer and Miss Palmateer, while still on vacation, called Miss Eveline two days before the hearing but refused to divulge her home address. In these circumstances, the objectors maintain that they could not subpoena Miss Palmateer and asks the Board to rely on her signed affidavit. The union argues that the onus is upon the objectors to establish the voluntariness of the petition and asks the Board to find that the gap in the evidence relating to the custody of the petition from the time it was handed over to Miss Palmateer after all of the signatures had been obtained, is fatal.

18. The Board has held that the requirement for first-hand evidence of the "circumstances surrounding the origination, preparation and circulation of a statement of desire

places an onus on those wishing to establish the voluntariness of the statement to call evidence of how each of the signatures was obtained as well as evidence detailing the physical preparation and the actual delivery of the document to the Board". (See *Formosa Spring Brewery*, [1974] OLRB Rep. Oct. 696.) Because the onus is on the petitioners to satisfy the Board as to the voluntariness of the statement, and because the signing of a statement against the union after signing a card in support represents a sudden change of heart, any gap in the evidence from preparation to delivery to the Board may prove fatal in any given case. It is for this reason that the Board has put petitioners on notice as to the extent of the evidence which may be required. A gap in the evidence relating to the delivery of the statement to the Board when considered in conjunction with other gaps in the evidence relating to custody of the document or in conjunction with evidence suggesting company involvement may cause the Board to find that it has not been satisfied as to the voluntariness of the statement. The Board, however, has never rejected a petition simply for the reason that it lacked first-hand evidence of the delivery of the document. The issue is one of voluntary expression and if the Board is satisfied that the origination and preparation of the statement is free of employer interference and is further satisfied that each of the signatures has been obtained in circumstances which would not thwart free expression and where, as in this case, a legitimate reason exists for the absence of the person who mailed the petition, the Board would be hard pressed to find that it had not been satisfied as to the voluntariness of the statement. The Board was faced with a gap in the evidence relating to delivery in *Weston Bakeries Limited*, [1979] OLRB Rep. Dec. 1309 (a termination of bargaining rights case) and in refusing to reject the petition filed in support of that application pointed out that there was "no suggestion that the petition may at some point have fallen into the hands of management" and further, "that the deficiencies in the evidence with respect to the matter of custody occur subsequent to the obtaining of all the signatures on which the Board is relying and the evidence does not disclose that the petition was being handled so loosely as to have given employees the impression that it might at some point come to the eye of management". Similarly, in this case the evidence before the Board, when considered in its entirety, satisfied the Board that the petition is a voluntary expression of those who signed. The lack of first-hand evidence of its delivery to the Board does not alter this result. Even if we were to assign no weight to Miss Palmateer's affidavit, therefore, the result would not be to undermine the petition.

19. Having regard to all of the foregoing we are satisfied that the statement of desire represents the true wishes of those who signed it and accordingly we hereby exercise our discretion under section 7(2) of the Act and direct the taking of a representation vote among those in the full-time unit. Those eligible to vote are all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period as of the date hereof and who do not sever their employment or who are not discharged for cause between the date hereof and the date of the taking of the vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

20. The matter is hereby referred to the Registrar.

1579-79-M Ontario Public Service Employees Union, Applicant, v. Humber College of Applied Arts and Technology, Respondent

Employee – Whether Board exercising discretion to exclude course co-ordinator from The Colleges Collective Bargaining Act – Relevant criteria reviewed

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *W. A. Lokay, J. Tait and G. Cwitco for the applicant; Donald F. O. Hersey, Susan A. Bissett and J. L. Davison for the respondent.*

DECISION OF THE BOARD:

1. This is an application under section 82 of *The Colleges Collective Bargaining Act*, to determine the employment status of the Occupational Health and Safety Consultant, Mr. Gary Cwitco. The Board has now had the benefit of the report of a Labour Relations Officer on the duties and responsibilities of Mr. Cwitco, together with the oral representations of the parties thereon.

2. Mr. Cwitco functions as a part of the Centre for Labour Studies at Humber College. The Centre itself was developed in cooperation with the Labour Council of Metropolitan Toronto to develop educational training programs for trade union members and workers generally in the Metropolitan Toronto region. The bulk of the funding for the Centre comes from the College, the remainder being obtained through government grants and through charges for specific programs.

3. Mr. Cwitco began his present function on a contract basis in February 1978, and moved to full-time staff during the course of 1979. His duties and responsibilities, in his own words, were generally “to make contact with trade unions in the Metro Toronto region, to find out about their concerns in the areas of occupational health and safety; to try and develop training programmes for them that met those needs, and to act as a resource person counselling union members’ staff representatives about various tactics, methods, concerns, around health and safety issues”. The training programs or courses may take different forms: they may be either credit or non-credit courses sponsored by the College itself; or they may be what are referred to as “Humber-assisted projects”, being programs sponsored by outside groups and in which Mr. Cwitco or his superior are asked to participate. In the semester immediately preceding this application, the Centre sponsored one part-time credit course, in occupational health and safety, of three hours a week, and a substantial number of non-credit courses. At least the latter type of these courses are generally held off campus, and Mr. Cwitco must arrange for suitable locations. The non-credit courses in particular are generally a response to requests from trade unions or a particular trade union, although current areas of concern, such as new health and safety legislation, may be identified by Mr. Cwitco in advance. General directions and program ideas are also discussed at meetings of the Centre’s Advisory Committee, which is a joint committee of the College and the Metropolitan Toronto Trades Council. Beyond these types of programs, Mr. Cwitco, as noted, functions also as a consultant to trade unions in the area, either on the basis of specific projects which he is asked to undertake on a contract basis, and for which the College charges the trade-union client a fee, or on the basis of *ad hoc* requests for information, for example on the toxic qualities of a particular substance.

4. Mr. Cwitco reports to Mr. Grogan, the Director of the Centre for Labour Studies. As Mr. Cwitco indicates, "I basically structure my work but I clear all of my projects with him, to let him know what I'm doing". Mr. Cwitco indicates further that he never commits the Centre to a particular program prior to clearing it with Mr. Grogan unless it involves Mr. Cwitco's time only. Mr. Cwitco describes his relationship with Mr. Grogan as "co-operative" and not the "traditional" supervisor-worker kind of relationship. Mr. Cwitco has no staff under him, and indicates it is up to Mr. Grogan when his correspondence gets typed. Mr. Cwitco did, however, have input into the hiring of a research assistant rather than a full-time secretary.

5. Mr. Cwitco is responsible for developing budgets for the individual programs which the Centre sponsors, but has no involvement whatever in any operational budget for the College or the Centre. He does sit down with Mr. Grogan, however, to work out of a fee for his contract work with a trade union, based both on the services performed and on their view of the particular trade union's ability to pay.

6. Once a program goal has been identified, it is up to Mr. Cwitco to decide who will develop and/or teach it. In many cases Mr. Cwitco opts for teaching the course himself, provided he has sufficient time available and expertise in the area. When he must look to others to teach, he generally draws from a pool of part-time instructors who teach other courses for the Centre, and makes his specific selection on the basis of particular expertise. Having done this, he will then ask the individual in question if he is interested. Mr. Cwitco acknowledges that he is expected to shoulder the responsibility for an instructor which he selects. If performance were not satisfactory, he could simply choose not to ask that person to instruct again.

7. While it is clear that Mr. Cwitco spends a substantial amount of his time teaching, the exact relationship between that and his other time spent on the job is difficult to discern. Mr. Cwitco's own records indicate that he taught for some 301 hours in 1979, or an average of 6.5 hours per working week. This is certainly substantial when one considers that, because of the original nature of the bulk of Mr. Cwitco's program requests, considerable time must be spent in development of the material as well. On the other hand, when Mr. Cwitco was asked by the respondent whether all of this teaching was done in the evening and weekends "on your own time", Mr. Cwitco responded, "Not all of it, no". He then indicated that the majority of the teaching was done on evenings and weekends. Given the sharp division between the applicant and respondent over the extent of Mr. Cwitco's responsibility for teaching, the evidence is less than satisfactory in providing the Board with a definitive answer in that regard. No job description was placed in evidence, although Mr. Cwitco does make reference to the fact that his remuneration was stated to be based at least in part on teaching experience. The respondent in cross-examination made reference to the fact that Mr. Cwitco received substantial overtime pay for some teaching assignments, but it is not clear whether such payment arose because Mr. Cwitco was engaged in teaching *per se*, or simply because he was working extra hours.

8. It is not easy, therefore, for the Board to arrive at what is generally referred to as the "primary" characterization of Mr. Cwitco's duties; that is, whether, if an "employee", he would fall within the "academic" (teaching) bargaining unit described in Schedule I to the Act, or the "support" bargaining unit described in Schedule II. The two descriptions are as follows:

"SCHEDULE I

The academic staff bargaining unit includes the employees of all

boards of governors of colleges of applied arts and technology who are employed as teachers, counsellors or librarians. . .”

“SCHEDULE II

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff . . .”

Were it not for the inclusion of the word “technical” in Schedule II, the Board would be inclined to place Mr. Cwitco in the “academic” unit. His job appears, however, to be more that of a “resource” person, and hence more appropriately subsumed within the term “technical” staff in Schedule II. Mr. Cwitco is, as he acknowledged in response to a question from the respondent, essentially “the authority at Humber College in occupational health and safety and the primary researcher in this field”. As such, he is called upon to perform in many ways, only one of which is actual teaching. Indeed, the amount of teaching done by Mr. Cwitco appears to be largely a matter of timing and circumstance, and at best is barely above the minimum required to keep him in the academic unit. His primary responsibility is to dialogue with the trade unions in order to identify program needs and see to their development, and to otherwise make available technical information as required. How Mr. Cwitco delivers on these goals appears incidental, and left largely to his own discretion. Characterization of his job as essentially a “technical” one in the support staff unit, therefore, appears to more accurately identify the fundamental responsibilities of Mr. Cwitco’s job. While the Board’s conclusion is based on the evidence as of the date of the application, one can also see that as the size of Mr. Cwitco’s program area continues to grow, his job will more closely resemble that of the development officers, etc. examined by the Board in *Algonquin College*, [1977] OLRB Rep. May 257, *Cambrian College*, [1980] OLRB Rep. Jan. 8, and *St. Clair College*, 1980 OLRB Rep. July 1067 and placed in the “support” category of the Act. Interestingly, the Board in the first two of those cases found the persons in question to be “employees” within the meaning of *The Colleges Collective Bargaining Act*, while in the third the opposite conclusion was reached. We now turn, appropriately, to a consideration of whether Mr. Cwitco falls within any of the named exclusions from Schedule II.

9. Schedule II reads in full as follows:

“SCHEDULE II

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor,

- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) persons regularly employed for not more than twenty-four hours a week,
- (vii) students employed in a co-operative educational training program undertaken with a school, college or university,
- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement,
- (ix) a person engaged for a project of a non-recurring kind,
- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario."

and "persons employed in a managerial or confidential capacity" (item (v)), are defined in section 1(1) as follows:

- (1) "person employed in a managerial or confidential capacity" means a person who,
 - (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
 - (ii) spends a significant portion of his time in the supervision of employees,
 - (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
 - (iv) is employed in a position confidential to any person described in subclause i, ii or iii,
 - (v) is employed in a confidential capacity in matters relating to employee relations,

- (vi) is not otherwise described in subclauses i to v but who, in the opinion of the Ontario Labour Relations Board, should not be included in a bargaining unit by reason of his duties and responsibilities to the employer.

10. The respondent argued with much resourcefulness that Mr. Cwitco is a managerial person “above the rank of foreman or supervisor”, and, more particularly, that he ought to be excluded under the provisions of section 1(1)(i), (iv) or (vi). The Board is unable to agree.

11. At the outset of its argument, the respondent put forward the proposition that, because of the absence of any preamble to *The Colleges Collective Bargaining Act* “promoting collective bargaining”, as in *The Labour Relations Act*, the Board’s approach to the statute ought somehow to be different. Without commenting on the respondent’s specific reference to the question of onus, the Board would only note that the Act before us is nonetheless a statute designed, in the same way as *The Labour Relations Act*, to regulate and develop arms-length collective bargaining and sound labour relations, and can only be read in that light. See the *Sheridan College* case, [1976] OLRB Rep. Dec. 844, at paragraph 22, and also, in a related vein, the *Cambrian College* case, [1980] OLRB Rep. Jan. 8, at paragraph 12.

12. The first ground for exclusion put forward by the respondent, as indicated, is that Mr. Cwitco is a person who

- “(i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer.”

In the Board’s view, however, Mr. Cwitco is not involved in the “formulation of organization objectives and policy” at the level contemplated by the section. We agree with Mr. Cwitco’s characterization of this question at page 19 of the Report, where he said:

“The policy was made when the decision to hire me was made, and that was a policy decision that the Centre for Labour Studies would be involved in occupational health and safety and within the framework of that policy that the Centre had decided as a policy for the Centre that health and safety was an important area.”

Beyond that, Mr. Cwitco obviously has considerable leeway and indeed the primary responsibility for developing the programs which will implement that policy, but this function performed by Mr. Cwitco is predominantly a technical one, with no discernible labour relations impact. His attendance at meetings of the Advisory Committee adds nothing to this assessment, as the discussion at these meetings again is of a technical nature, directed at course content. The trade union leaders attend not in any management capacity to discuss internal trade union affairs, but rather as clients of the College, and there would appear to be nothing either managerial or confidential to the College about these discussions, in a labour relations sense.

13. As for the second element of the subsection, involvement “in the formulation of budgets of the employer”, it is clear that Mr. Cwitco participates in formulating budget proposals for individual courses or seminars, but not for any operating budget for the College or Centre themselves. We take the words “of the employer” to have been added in the subsection for more than the sake of obvious clarity. Rather, bearing in mind the labour relations purpose of the exclusion, these final words tend to underscore the view that the “budgets” referred to in

the subsection are those that determine the spending priorities of the employer itself. It is budgets of this latter type that raise a significant conflict of interest with respect to employment possibilities or conditions, and not budgets pertaining to individual courses or seminars, setting out the costs to be incurred for room rentals, etc., and the amount to be recouped from clients in fees. See also *Cambrian College, supra*, at para. 15. There is no evidence whatever indicating any significant discretion on the part of Mr. Cwitco in varying the amount to be ascribed to the remuneration of other instructors in these budgets. And while some of the budgets appear to entail a substantial commitment of funds for expenditures by Mr. Cwitco, and the exercise of a measure of discretion, this amounts to the spending of the College's funds only in the sense that the expenditures may take place before the offsetting fees are actually collected. It is essentially an "advance" to the particular program, budgeted as they generally are to carry their own costs.

14. The respondent also argued that Mr. Cwitco must be excluded on the basis that he

"(iv) is employed in a position confidential to any person described in subclause (i), (ii) or (iii)."

There is, however, insufficient evidence concerning Mr. Cwitco's superior, Mr. Grogan, for the Board to determine whether Mr. Grogan himself fits within either of subsections (i), (ii) or (iii) of section 1(1). This is the same problem the Board was faced with in the *St. Lawrence College* case, Board File No. 1657-77-M, an unreported decision issued July 11, 1978. But even if the Board were prepared to draw the necessary inference concerning Mr. Grogan, the Board has indicated, in *Sheridan College*, [1976] OLRB Rep. Dec. 844, paragraph 37, that even though the focus of this subsection is on the relationship and not the material passing between the two individuals under examination, the confidence still must relate, having regard to the nature of the statute, to a function that is incompatible with collective bargaining. The evidence fails to disclose anything close to the kind of unavoidable and continuous exposure to the information of the superior referred to in the *St. Lawrence* case. Mr. Cwitco did indicate that he and Mr. Grogan function more as equals than in the traditional "superior-worker" relationship, but this appears to be a reference to the respect and latitude afforded Mr. Cwitco because of his greater technical expertise in this area, rather than to any passing of confidential information the other way. Certainly joint input into such matters as the fixing of fees poses no labour relations threat to justify exclusion under this head. And in the limited cases hypothesized by the respondent where the applicant, OPSEU, may be the trade-union client for whom a fee must be set, the membership of Mr. Cwitco in the applicant's bargaining unit is surely a matter which Mr. Grogan would have no difficulty taking into account. The Board would not be inclined to exclude on the basis of so isolated a conflict.

15. This brings us to an examination of subsection 1(1)(vi), enabling the Board to exclude a person who

"is not otherwise described in subclauses 1 to v but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer."

It is important to note that it was on this discretionary ground that the Board decided to exclude the Divisional Directors and their Assistants in *St. Clair College, supra*. These individuals, together with their superior, Mr. Giroux, were found to be responsible for the entire operation of the College's Continuing Education School, involving numbers of courses, teachers,

students and clerical staff in no way comparable to the Occupational Health and Safety program before us in the present case. As the Board there stated, at paragraph 50:

“...Indeed, it would be curious to hold, as the union suggests, that the entire continuing education programme involving thousands of students, hundreds of courses, hundreds of part-time teachers, and dozens of part-time clerical personnel, is managed solely by R. F. Giroux. In the absence of considerably more evidence than is currently before us considering the way in which the School of Continuing Education fits into the general framework of the respondent’s organization, and in the absence of any evidence of significant managerial control exercised by persons outside the school, we are compelled to conclude that the school is, in fact, managed by Giroux, the five Divisional Directors and the two Assistant Divisional Directors...”

16. Mr. Cwitco is, by contrast, virtually a “one-man show”. It is really only on that basis that he can be said, as the respondent argues, to “run” the program on a day-to-day basis. He does have the responsibility to produce the program, and is given great latitude in this regard. The Board finds, however, that Mr. Cwitco in so acting is employed in essentially a technical but not a managerial capacity. If he is not himself going to teach a course, he can decide whom to approach instead. He generally operates, however, within a pool of part-time instructors already associated with the Centre, and his choice is usually dictated by the area of expertise involved. It is true that his capacity not to approach a given individual the next time constitutes a real element of control in the hiring process, but on the evidence this factor is not sufficiently significant to be compelling in the present case. The pool Mr. Cwitco generally draws from are all known quantities, and the need to exercise this discretion has never arisen. The evidence indicates some measure of input regarding the hiring of additional teachers to come on staff with the College, and of support personnel, but again, this is both limited and isolated. Finally, while Mr. Cwitco makes it clear that he “promotes” his program every chance he gets, this does not indicate a “marketing” function in the sense used in other cases. It must be remembered that his position is designed primarily to *respond* to the needs of the various trade unions, and individual programs tend to be custom-made in response to a specific request. The emphasis on marketing, therefore, is nowhere near what was the case in *St. Clair College*, where the programs are spawned internally and then must be “sold”. In that case the annual budget of a single Divisional Director was in the neighbourhood of \$400,000, and much of that individual’s efforts were directed toward recouping from the consuming public as much as two-thirds of that overhead. In the present case, the Board is unable to find any significant incompatibility between Mr. Cwitco’s job as Occupational Health and Safety Consultant and his inclusion in the applicant’s support staff bargaining unit, and we decline to exercise our discretion under section 1(1)(vi).

17. For all of the foregoing reasons, the Board finds that Mr. Cwitco is not a foreman or a supervisor, or a person above that rank, or otherwise excluded under the provisions of Schedule II, and the Board hereby declares Mr. Cwitco to be an “employee” within the meaning of Schedule II of *The Colleges Collective Bargaining Act*.

2091-79-R Ontario Public Service Employees Union, Applicant v. Ontario Metis and NonStatus Indian Association, Respondent, v. Group of Employees, Objectors.

Constitutional Law – Whether non-status Indians under exclusive federal jurisdiction – Whether jurisdiction over labour relations integral part of federal jurisdiction over Indians

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Chris G. Paliare and Pauline Anidjar for the applicant; John Keefe for the respondent; no one appearing for the objectors.*

DECISION OF THE BOARD:

1. This is an application for certification, which raises a question concerning the applicability of *The Labour Relations Act* to the employees of a “non-status” Indian Association. The respondent argues that many of its members and employees are “Indians”, that its activities are undertaken in relation to a matter of federal concern, and that consequently its employer-employee relationships are subject to regulation only by the Federal parliament. The respondent concedes (as its name suggests) that its membership is not composed of “Indians” within the meaning of the *Indian Act*, R.S.C. 1970, c. I-6, as amended; nor are the beneficiaries of its activities, necessarily, or exclusively, “non-status Indians” or persons of native ancestry. The respondent argues however, that its primary purpose is the economic betterment of persons of native ancestry who have been excluded from the *Indian Act*, and that, accordingly, its functions place it in the federal jurisdiction. It will be observed that the respondent’s position involves two related propositions: that it is an organization of “Indians” within the meaning of section 91(24) of *The British North America Act* (although not within the meaning of the *Indian Act*); and that its economic activities are of a “federal character” so that its employer-employee relationships cannot be regulated by provincial legislation.

I

2. The Ontario Metis and Non-Status Indian Association (hereinafter referred to as “the Association”) was incorporated pursuant to the provisions of *The Corporations Act*, R.S.O. 1970, c. 89, by letters patent dated June 1, 1971, as a charitable corporation without share capital. The objects set out in the letters patent are as follows:

“(a) To carry out programmes consistent with those of a charitable organization for the advancement of the level of education, training and opportunity, and for the relief of poverty among the Metis and non-status Indians of Ontario;

(b) To bring together isolated Metis and non-status Indian organizations so that they can have more strength in unity;

(c) To develop the social and economic needs of the Metis and non-status Indians of Ontario;”

The Association is a non-profit service organization similar to a service club which runs programmes primarily for the social, educational, and economic advancement of persons of native ancestry who are not recognized as "full status Indians" and do not enjoy the benefits of the *Indian Act*. The Association's aims and objects are listed in its constitution and by-laws as follows:

- "a) to carry out programs consistent with those of a charitable non-profit organization for the social, cultural, education and economic advancement of the Metis and Non-Status Indian people of Ontario.
- b) to inform the general public of Ontario of the aims and objects of the Association and to secure the co-operation of the non-native community in our struggle for identity and recognition in Canadian society.
- c) to assist Metis and Non-Status Indian people of Ontario to organize at the local level, to affiliate with the Association for the purposes of actively participating in the development of their communities.
- d) specifically to engage, as an Association, in programs designed to assist in furthering the education opportunities and employment opportunities of the Metis and Non-Status Indians of Ontario and wherever possible to obtain or raise funds from any sources for these purposes.
- e) to develop and operate in conjunction with federal, provincial and municipal agencies a housing program designed to provide safe, healthy, adequate shelter for the native people of Ontario.
- f) to co-operate with all other native organizations whose aims and objects are similar to those of the Association.
- g) generally, to assist in the improvement of existing programs and services and to develop new programs and services designed to meet the special needs of the native people of Ontario."

3. Any resident of the Province of Ontario who is eighteen years or over, who is of native ancestry, and who is *not* a registered Indian within the meaning of the *Indian Act*, is eligible for full membership in the Association. The spouse of any such person (whether or not he/she is of native ancestry) is also eligible for full membership. In addition, any interested person who supports the aims and objects of the Association, may become an associate member upon payment of the prescribed fees. Any group of twelve or more persons qualified for full membership, and residing in Ontario, may form a local association which can become affiliated with the respondent. For administrative and organizational purposes, the Province of Ontario is divided in five geographic zones. The Association is managed by a Board of Directors, and an executive committee elected by local association delegates. The general policy of the Association is set by a general assembly of delegates which meets at least once a year.

4. The Association operates solely within Ontario although it is affiliated with the Native Council of Canada – “an umbrella organization” of Metis, Status and Non-Status Indian groups operating on a nation wide basis. Membership in the Native Council of Canada is voluntary. The Association of Metis and Non-Status Indians of Saskatchewan, and the Manitoba Metis Federation, are not member of the N.C.C..

5. In addition to its general organizational and lobbying functions, the respondent is involved in a number of specific projects which are independently funded and are supervised by the Association's Board of Directors and Executive Committee. The individuals who are subject of this certification application are employed by the Association on these projects. There are fifty-three employees in the bargaining unit which the parties have agreed is appropriate for collective bargaining. Of these fifty-three employees, thirty are of native ancestry and two are “full-status” Indians. When the total employee complement is considered (i.e. including both managerial and non-managerial employees,) it is evident that about sixty per cent of the employees are of native ancestry; however, there are non-native people in every department, and many of the managerial personnel are non-native.

6. The respondent filed with the Board a list of some of the projects currently being operated by the Association. These include,

- “1. The investigation and documentation of aboriginal land claims.
2. The provision of new housing for rural and native persons with low incomes.
3. An Outreach programme designed to bring employment services to native persons (status and non-status) unable to take advantage of conventional assistance.
4. The development and evaluation of a policy for the economic development of the Metis and Non-Status Indian people of Ontario.
5. The publication of a bi-monthly magazine addressing matters of concern to the Metis and Non-Status Indian Community of Ontario.
6. The development of Community Recreation Programmes.
7. The development of Community Education Programmes.”

The persons who receive the benefits of these programmes are not exclusively individuals of native ancestry. The housing project for example, assists both native and non-native persons. The respondents' employees help rural and native people with low income to form housing societies which can obtain financial assistance from the Central Mortgage and Housing Corporation; however, many of these societies have non-native members. Similarly, the community recreation programmes established by the Association and run by its employees and volunteers, are frequently open to members of the general community. Of the approximately twenty-three projects involved in the Association's recreation programme, the

applicant listed at least twelve which permit or encourage access and participation by non-native persons.

7. The “core funding” for the Association (i.e. funds for its organizational, administrative and operating costs) are supplied by the Federal government pursuant to an agreement which expires in 1982. Budgets are submitted annually, and the Association is required to submit annual financial statements in a prescribed form. The Association also receives some funds from the Ontario government.

8. Projects are funded on an individual basis by the relevant Federal or Provincial government department. These departments are seldom exclusively, or even primarily, concerned with the rights, interests or problems of native people. The education programme is financed by the Provincial Ministry of Education. The recreation programmes are financed by the Sports and Fitness Branch of the Secretary of State. “Dimensions Magazine” receives support from the Communications Branch of the Secretary of State, and the Native Communities Branch of the Provincial Ministry of Culture and Recreation. The “Outreach Programme” is conducted by the Federal Ministry of Employment and Immigration and is intended to improve the employability of individuals who experience special difficulties competing in the labour market. It is not directed solely at native people. The Federal Ministry of Employment and Immigration also supports economic projects under its “Local Employment Assistance” programme. Housing projects are funded by the Central Mortgage and Housing Corporation as part of its rural and native housing programme. Research into Indian lands claims is financed by Indian and Northern Affairs Canada.

9. Many of the Association’s employees, and members, and many of the individuals benefiting from its activities, are persons of “mixed blood” or mixed native and non-native ancestry. However, except for the employee complement, there is no evidence before the Board concerning the precise proportion of non-native members or beneficiaries; nor, with respect to those who can claim some degree of affinity with native ancestors, was there any evidence concerning the strength of that connection. It is evident that, over time, successive inter-racial marriage can weaken the racial link or claim to full Indian status, and like all family or blood relationships, the affinity to a particular ancestor is a matter of degree. Some relatives are “closer” than others.

II

10. The first question which must be addressed is whether the respondent’s membership, or the persons to whom it provides its services, can be regarded, at least predominately, as “Indians”. The respondent contends that there are, and that this is what gives the organization its “federal character”. The problem (apart from the evidentiary difficulty to which we have already referred) is that there is little authority other than the *Indian Act* itself to assist the Board in resolving this issue. The question which must be determined is whether these individuals are “Indians” within the meaning of *The British North America Act* — not “Indians” as defined in the *Indian Act*. The fact that Parliament has not legislated in respect of the Metis or Non-Status Indians, does not conclusively determine their Indian status. On the other hand, *The British North America Act* invests Parliament with jurisdiction over Indians as a class of protected individuals or special wards of the state, and the Board should not lightly conclude that that class is much larger than that specified in the *Indian Act*. If Parliament has not accorded these individuals Indian status, and has not sought

to regulate matters which may touch their "Indianness", how, asks the union, can the Board conclude that the respondent's employer-employee relationships — matters irrelevant to Indian status or "Indianness" — are subject to federal regulation? In any event, contends the union, even if the respondent's members and the persons whom it assists are predominately Indians, *The Labour Relations Act* of Ontario applies because it is a provincial statute of general application which does not single out Indians, does not purport to regulate Indians qua Indians, and is not superseded by any paramount federal legislation.

11. The Supreme Court of Canada dealt with the term "Indian" in *Re Eskimos*, [1939] S.C.R. 104; [1939] 2 D.L.R. 417 — a case which is of interest chiefly because it illustrates the method by which the meaning of the term "Indian" should be ascertained. *Re Eskimos* involved a controversy between the Dominion and the Province of Quebec, concerning the status of Eskimos residing in the province, and the Court was asked to determine whether those Eskimos could be considered "Indians" within the meaning of section 91(24) of *The British North America Act*. The Court decided that in order to answer that question, it had to consult historical materials and determine whether in 1867 the Eskimos who were living in what was then Rupert's Land and the Northwest Territories, would have been regarded as "Indians". This inquiry involved a perusal of 18th and 19th century documents including: aboriginal maps of North America, early documents of the Hudson's Bay Company which had been laid before an investigating committee of the British House of Commons in 1856-57, and reports from missionaries, clergymen, colonial and local officials. On the basis of this historical evidence, the Court concluded that the term "Indians" was synonymous with "Aborigines" (or perhaps "Savages") and that Eskimos were properly classified under the generic term "Indian".

12. In *Re Eskimos*, of course the Court was dealing with a group of full-blooded aboriginal people, and was not concerned, as we are, with persons of mixed blood whose connection with unequivocal Indian status has been weakened by intermarriage or historical circumstances. The case is helpful therefore chiefly for the proposition relied upon by the respondent: that the term "Indian" in *The British North America Act* may be broader than that prescribed in the *Indian Act* (which now excludes Eskimos and Indian women who marry non-Indian men, but includes, as Indians, non-Indian women who marry Indian men). It is interesting to note however that almost all of the documents to which the Court referred distinguished between "Indians" or "Aborigines", and "half Indians", "half-breeds", or persons of "mixed race" or "mixed blood" who were not apparently regarded as Indians. The 1857 Hudson's Bay Company census, upon which both Duff, C.J.C. and Kirwin, J. relied, placed both whites and "half-breeds" in the same category, and excluded them from the list of the Indian races. *Re Eskimos* therefore, confirms the respondent's position, but at the same time raises some doubt whether Metis or other persons of mixed blood should automatically be regarded as Indians — at least in the absence of affirmative evidence that they were so regarded by the Imperial Parliament in 1867.

13. A perusal of the statutes respecting Indians and Indians lands which were enacted immediately before, and after Confederation does little to clarify the issue before us. All of these statutes have Indians as their primary focus, but many of them extend benefits to persons who are not Indians in the strict sense or, for legislative purposes, define the term "Indian" in a manner unlike that of the present *Indian Act*. (See for example: *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c. 42, Section 5; or *An Act for the Gradual Emancipation of Indian, the Better Management of Indian*

Affairs, and to Extend the Provisions of the Act, S.C. 1869, c. 6 which, *inter alia*, denied Indian status to an Indian woman marrying a non-Indian, and provided that annuity money in respect of designated Indian lands, would not be paid to any person with less than one-fourth Indian blood). The language of these various statutes clearly recognizes a distinction between Indians and non-Indians but frequently purports to affect the rights of both — if only by definition. The respondent argues that since *The British North America Act* confers a grant of legislative jurisdiction by reference to a racial classification, the powers of the Dominion Parliament must be broad enough to embrace the rights of, non-Indian spouses, persons of mixed blood, and so on. To this argument the union makes the same reply: how can the respondent's labour relations form an integral part of primary federal jurisdiction over Indians and lands reserved for Indians, when for many years Parliament has denied that Metis or other persons of mixed blood are entitled to Indian status and has not accorded them the rights, privileges and protection of the *Indian Act*? Indeed, the very existence of the respondent evidences the historical distinction drawn between Indians who were wards of the Federal Parliament and entitled to special status, and non-status Indians or other persons of mixed blood who were treated as ordinary citizens. One of the objectives of the respondent Association is to persuade the Federal Parliament to eliminate this historical distinction.

14. In view of the definition of "Indian" in the *Indian Act* and the long-standing historical distinction between "Indians" and "Metis" or persons of mixed blood; and in the absence of any historical evidence to demonstrate that the Imperial Parliament in 1867 regarded Metis or "half-breeds" as "Indians", the Board cannot conclude that the respondent's members or beneficiaries are "Indians" within the meaning of section 91(24) of *The British North America Act*. To accept the respondent's contention in the absence of historical evidence, would be to find that a mere assertion of Indian status is enough to establish it as a fact —and this result seems inconsistent even with the *Indian Act* itself which contains an elaborate mechanism for the determination of status, registration and appeal. However, even if the respondent's members and beneficiaries are Indians, we have concluded that the respondent's employer-employee relationships are subject to provincial regulation.

III

15. The factual context and the issues raised in the present case appear to be unique. None of the cases to which we were referred deal with the rights of "non-status Indians"; nor is there any consideration of the application of provincial law to a social service institution unconnected with reserve lands and unrelated to "Indians" as defined in the *Indian Act*. It would seem that non-status persons of Native ancestry have been treated in the same way as ordinary citizens, and we were unable to find any authority for according them different rights, or exempting them or their organizations from provincial laws of general application. In view of the novelty of the issue however, it may be useful to briefly review the extent of provincial jurisdiction over Indians and refer to several cases dealing with federal authority over what would otherwise be a matter within provincial competence. Professor Hogg's statement of general principles provides a useful starting point. At page 387 of his *Constitutional Law of Canada* (Carswell, 1977) he remarks:

"To what extent are provincial laws applicable to Indians and lands reserved for Indians? On principle, it seems obvious that the provincial Legislatures have the power to make their laws applicable to Indians and on Indian reserves so long as the law is a law in relation to a provincial

head of legislative power. It would be astonishing if the provinces lacked the constitutional power to make applicable to Indians and on reserves laws such as that making drivers drive on the right-hand side of the road, or confining the practice of medicine to qualified physicians, or imposing standards of construction for residential housing. The situation of the Indians and of Indian reserves should not be any different from that of aliens, banks, federally-incorporated companies, and interprovincial undertakings. These, too, are subjects of federal legislative power, but they still have to pay provincial taxes, and obey provincial traffic laws, health and safety requirements, social and economic regulations and the myriad of other provincial laws which apply to them in common with other similarly situated residents of the province. ...

There are three qualifications to this basic proposition: (1) a provincial law which "singles out" a federal subject for special treatment runs the risk of being classified as in relation to the federal subject and therefore being held unconstitutional: p. 82, above; (2) a provincial law which impairs the status or essential powers of a federal subject is inapplicable to that federal subject: p. 92, above; and (3) a provincial law which is inconsistent with a federal law is inoperative by virtue of federal paramountcy;"

16. The cases to which we were referred fall into two broad categories: cases in which provincial legislation purported to regulate Indians only as persons residing in the province but in so doing allegedly affected their Indian status; and cases specifically involving employer-employee relationships in which provincial jurisdiction turned on the economic functions of the employing entity and whether those functions could properly be regarded as of a federal character such that the organization could be considered a "federal" work, undertaking, or business. The former cases focus on the impact of provincial legislation on individuals as Indian persons in respect of their "Indianness". The latter cases focus on the character of the employer, and are based on the premise that federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object. In our view, neither approach supports the respondent's contention that regulation of its employer-employee relationships, is beyond the jurisdiction of the provincial Legislature.

17. The leading case concerning the intrusion of provincial legislation upon the status of Indians qua Indians, is *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751. In that case the Supreme Court of Canada was called upon to determine whether provincial adoption laws could be applied to the adoption of a status Indian child by parents who did not have Indian status. The case involved "Indians" and "Indianness" in a personal sense; that is intimate, personal and family relationships, and the status of Indian children as defined by the *Indian Act*. The case was not concerned with the economic, commercial, organizational or institutional activity of a group, band or tribe and in this sense, the focus in *Natural Parents* was quite different from that in the present case.

18. Four of the learned judges, including the Chief Justice, were of the view that the original family was the essence of Indian status and that the application of *The Adoption Act* to the adoption of *Registered* Indian children would touch their "Indianness" and strike at a

relationship integral to a matter outside provincial competence. Accordingly, provincial legislation of general application would not apply to Indians unless "the inclusion of Indians within the scope of the provincial legislation touches them as ordinary citizens and in a way that does not intrude on their Indian character or their Indian identity and relationship". The application of provincial legislation was dependent upon section 88 of the *Indian Act* (which purports to incorporate by reference provincial laws of general application which are not inconsistent with federal law). On the other hand, three judges concluded that the adoption legislation was applicable of its own force in the absence of paramount federal legislation. Ritchie J., in a separate judgment, agreed that the legislation operated of its own force, and expressed the view that the impugned provincial legislation did not alter the status, rights privileges, disabilities or limitations acquired as an Indian under the *Indian Act*. The adoption legislation touched Indians as ordinary citizens and was not in conflict with the *Indian Act*.

19. *Natural Parents*, as we have already pointed out, was concerned with the rights, privileges and status of Indians as individuals or protected "federal persons"; it did not deal with Indian institutions or economic, social or political activities (let alone those of "Non-Status Indians"). It might be noted however that, despite the diverse views expressed by the various members of the Court, none of the learned judges dealt with Indian status in the abstract. All of them were concerned with the loss of status as defined by the *Indian Act*, or a conflict between provincial legislation and the *Indian Act*. In all cases, the foundation for the analysis was the rights accorded to Indians under the *Indian Act*. In the present case there is no conflict with the *Indian Act* and it is difficult to discern any relationship between the right of the respondent's employees to engage in collective bargaining and the Indian status identity or family relationships of its employees, members, or beneficiaries.

IV

20. From a constitutional perspective, collective bargaining is a derivative relationship and the propriety of federal regulation turns upon the character, operations, or functions of the enterprise rather than the status of its principals, or customers. A federally incorporated company, for example, is a "federal person", but this does not mean that its employer-employee relations are subject to federal legislative jurisdiction. Similarly, an alien employer is not automatically within federal jurisdiction, nor is a business which supplies goods or services to aliens. Two cases dealing with "Indian enterprises" will illustrate different aspects of this proposition.

21. In *Lawrence Francis et al v. Canada Labour Relations Board et al* (decision of the Federal Court of Appeal released May 30, 1980 as yet unreported) the Court was called upon to consider, *inter alia*, the application of the *Canada Labour Code* to the employees of the St. Regis Indian Reserve. The lands of the reserve are situated in both Ontario and Quebec and its affairs are run by a Band Council. The authority of the Band Council is governmental in nature and is exercised pursuant to the *Indian Act*. The employees in question were employed by the Band Council as "civil servants" and were engaged in various activities on the reserve including: the administration of Indian lands and estates, housing, welfare services, the maintenance of roads and schools, garbage collection, etc. Because of the powers given to the Band Council under the *Indian Act*, and its authority to direct the administration of the Band and the reserve, the Court found that its employer-employee relationships were an integral part of primary federal jurisdiction over Indians and lands reserved for Indians. In the present case there is no connection with Indian land or rights associated with residing on an Indian

reserve; nor is there any connection with an Indian Band or its governance, or the exercise of any authority prescribed by the *Indian Act*. The respondent is merely a private social organization formed to provide social and economic assistance to a class of persons not recognized as Indians by the *Indian Act*.

22. A contrasting case is *Four B Manufacturing Limited v. United Garment Workers of America et al* (1980), 102 D.L.R. (3rd) 385 in which the Court reaffirmed that labour relations was a matter within exclusive provincial jurisdiction except in the case of "undertakings, services, and businesses which, having regard to the functional test of the nature of their operations, and their normal activities, can be characterized as federal undertakings, services, or businesses" (per Beetz J. at page 395). That case involved a private company owned by Indians, operating on an Indian reserve pursuant to a permit issued by the Band Council under the authority of the *Indian Act*, employing primarily Indians, supported by federal subsidies, and supporting the general economy of the community by its presence. These factors however were not sufficient to establish federal jurisdiction as the Court explained in a long passage to which we might usefully refer:

"The functional test is a particular method of applying a more general rule namely, that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object: the *Stevedoring* case.

Given this general rule, and assuming for the sake of argument that the functional test is not conclusive for the purposes of this case, the first question which must be answered in order to deal with Appellant's submissions is whether the power to regulate the labour relations in issue forms an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians. The second question is whether Parliament has occupied the field by the provisions of the *Canada Labour Code*.

In my opinion, both questions must be answered in the negative.

I think it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil rights of Indians. The matter is broader and more complex: it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either, the operation of which the Band has expressly refused to assume and from which it has elected to withdraw its name.

But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, neither Indian

status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. Whether Parliament could regulate them in the exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy."

The Court held that exclusive federal competence over certain classes of persons did not mean that the totality of their rights came under federal competence to the exclusion of provincial laws of general application. Those laws could continue to apply to Indians as long as they do not single out Indians nor purport to regulate them qua Indians, and as long as they are not superseded by valid federal law. The *Indian Act* did not provide for labour relations and the majority of the Court was of the view that even if Indians were regarded as "federal persons" the commercial activities of the company in question could not be regarded as a "work undertaking or business" within the jurisdiction of the federal government or the ambit of section 108 of the *Canada Labour Code*.

23. The Chief Justice (with whom Ritchie J. concurred) dissented and held that the company's activities, although commercial, in nature, constituted a "federal work undertaking or business because of the combination of circumstances which governed its operation. Laskin C.J.C. summarized these as follows:

"The combination of circumstances which govern the operation of the factory in the present case bring it, in my opinion, squarely within ss. 2 and 108(1) of the *Canada Labour Code*. There is the fact that the factory is operated by Indians and for Indians; it is operated on a Reserve in a building leased from the Band Council; it is operated under a revocable licence issued by the responsible federal Minister with the approval of the Band Council and under terms set out in the licence or permit; it is financed by federal funds provided under the special Indian Economic Development Fund pursuant to four agreements of September 9, 1974, October 11, 1974 and two on July 8, 1976 for the stated purpose "of employing members of the Band in all positions possible and... for the benefit of the Band as a whole to improve their economic position and provide continuing employment for Band members"; and it is operated under the detailed provisions in the *Indian Act* and under the approvals therein prescribed.

These circumstances bring the appellant enterprise squarely within the opening words of s. 2 aforesaid, as being "an undertaking or business that is within the legislative authority of the Parliament of Canada". Consequently, in the words of s. 2(i) it is an undertaking or business outside the exclusive legislative authority of provincial legislatures. Section 108 applies to the employees of the applicant company since they are

employed in connection with the operation of the appellant company's factory in the Reserve. It follows, therefore, that certification to enable a trade union to represent the employees of the appellant company must be sought under the *Canada Labour Code*."

The dissent stresses the importance of a connection with Indian land, the Band Council, or the *Indian Act* — none of which are applicable in the case before us.

24. A final case which should be mentioned in *Canadian Pioneer Management Limited et al v. Saskatchewan Labour Relations Board* 80 CLLC ¶14,018 (S.C.C.). That case involved the applicability of provincial labour relations legislation to a financial institution which performed virtually all of the economic functions of a chartered bank but was not considered a chartered bank under the *Bank Act*. Counsel for the Attorney General of Canada argued that *exclusive* federal jurisdiction over banks and banking precluded the application of provincial legislation (in this case labour legislation) even in the absence of an assertion of federal authority over the subject institution. In dismissing the argument, the Court drew an analogy which is of particular interest to the case at bar. At page 12,109 the Court commented:

"Only one serious objection to the institutional approach can be raised and it has been raised by Counsel for the Attorney General of Canada. It is based on the exclusiveness of federal legislative powers relating to Banking and the Incorporation of Banks. It was contended that provincial legislative jurisdiction and the extent and applicability of provincial legislation cannot depend on the abstinence of Parliament from legislating to the full limit of its exclusive powers. *The Union Colliery and Commission du Salaire Minimum* case were relied upon.

It do not think this objection is valid in this case.

Legislative jurisdiction involves certain powers of definition which are not unlimited but which, depending on the particular manner in which they are exercised, may affect other jurisdictional fields.

For instance, Parliament has exclusive legislative jurisdiction over the Establishment, Maintenance, and Management of Penitentiaries under section 91(28) of the Constitution, and each Province has exclusive legislative jurisdiction over the Establishment, Maintenance and Management of Public and Reformatory Prisons in and for the Province, under section 92(6). At present, the line of demarcation between the two appears to depend in part upon federal legislation such as section 659 of the *Criminal Code*.

Another example is provided by the legal status of the Eskimo inhabitants of Quebec. They are not Indians under the *Indian Act*, R.S.C. 1970, c. I-6, section 4(1), but they are Indians within the contemplation of s. 91(24) of the Constitution: *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104. Should Parliament bring them under the *Indian Act*, provincial laws relating to descent of property and to testa-

mentary matters would cease to apply to them and be replaced by the provisions of the *Indian Act* relating thereto.

Parliament having chosen to exercise its jurisdiction over Banking and the Incorporation of Banks from an institutional aspect rather than in functional terms, as was perhaps unavoidable, did not necessarily exhaust its exclusive jurisdiction; but it left institutions which it did not characterize as being in the banking business to the operation of provincial labour laws.”

25. The remarks of the Court in *Canadian Pioneer Management Limited* suggest that an institution which *might legitimately* be defined as an entity or subject of federal legislative concern, remains subject to provincial jurisdiction in all its aspects unless the Federal Parliament chooses to exercise its powers of definition and regulation. Similarly, the remarks of the Court would seem to confirm that Eskimos — who are undoubtedly “Indians” under *The British North America Act* — remain subject to provincial laws of general jurisdiction unless Parliament chooses to legislate. This would appear to be the case even in respect of those laws which effect important property and civil rights or bear materially on the economic and social welfare of Eskimo citizens. In our view it would be curious to suggest that these important matters remain subject to provincial jurisdiction, but that if a group of Eskimos forms a non-profit organization to promote their political, cultural, economic, and recreational interests its employer-employee relationships (if any) would be subject to federal law. Employer-employee relationships have nothing to do with Indian status per se, and there is no clear reason why they should be put on a different plane from other civil rights in the province. And, if trust companies or other financial institutions of the kind considered by the Court in *Canadian Pioneer Management* formed on association to promote their economic interests and lobby the federal government for inclusion under the *Bank Act*, would be employees of such association be subject to federal labour law? In our view, there is considerable force to the union’s submission that (to paraphrase the words of the Court in *Canadian Pioneer Management*) persons or institutions which Parliament has chosen not to characterize as “Indian” should remain subject to the operation of provincial labour laws.

26. After carefully considering the totality of the evidence, and comparing the circumstances in the present case with those existing in *Four B Manufacturing* and *Lawrence Francis et al v. CLRB et al* we have concluded that the respondent’s operation cannot be considered a “federal undertaking or business” even if many of its members, employees, and “customers” are Indians. Economic advancement, housing, and recreation, are not exclusively Indian concerns nor is the respondent the only organization supplying such services to an Indian or Native clientele. There is no connection with Indian lands, the administration of reserves, or the exercise of rights or responsibilities under the Indian Act. The most that can be said is that the respondent’s members seek some of the benefits of “full Indian status” for themselves and for other people of native ancestry resident in the Province of Ontario. We do not think such aspirations are sufficient to remove the respondent’s operations from provincial jurisdiction. Jurisdiction over its labour relations does not form an integral part of primary federal jurisdiction over Indians and Indian land. The respondent’s connection with this object is simply too tenuous and remote. In the result therefore we are satisfied that *The Labour Relations Act* of Ontario is applicable to its collective bargaining relationships, even if many of its members, employees and “clients” are Indians.

V

27. The Board is satisfied on the basis of all of the evidence before it that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

28. Having regard to the agreement of the parties the Board is satisfied that all employees of the respondent working in the Province of Ontario, save and except the President, Vice-President, Secretary-Treasurer, Programme Directors, Assistant Programme Directors, Executive Assistant to the Executive Committee, Executive Secretary to the Executive Committee and Head of Financial Services, constitute a unit of employees appropriate for collective bargaining. For the purposes of clarity the Board notes the agreement of the parties and Mr. Hedican is properly described as a "Programme Director".

29. Having regard to the evidence before it the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on February 27, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

30. A certificate will issue to the applicant.

1386-79-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **RCA Limited**, Respondent, v. Canadian Union of Operating Engineers & General Workers, Local 101, Intervener, v. Group of Employees, Objectors.

Bargaining Unit – Certification – Employee – Whether technical employees sharing community of interest with clerical and office employees – Whether secretaries employed in confidential capacity in labour relations matters – Whether professional engineers sharing community of interest – Board directing vote pursuant to section 6(3)

BEFORE: M. G. Picher, Vice-Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

DECISION OF THE BOARD; September 16, 1980

1. By a decision dated November 16, 1979, the Board granted interim certification in respect of a bargaining unit of office, clerical and technical employees of the respondent at its plant in Midland. There are some five categories of employees whose inclusion in the bargaining unit is still in dispute. The Board, therefore, appointed a Labour Relations Officer to inquire into the job functions of the individuals concerned and heard the submissions of the parties on the content of the Labour Relations Officer's report.

2. The first persons challenged are five secretaries to senior company executives. The

respondent maintains that these individuals are employed in a confidential capacity in matters of labour relations, and are therefore not employees within the meaning of section 1(3)(b) of *The Labour Relations Act*. The persons involved are as follows:

L. King	— Secretary to the Manager of Financial Operations
M. Bachtrog	— Secretary to the Manager of Color Picture Tube — Engineering and to the Manager of Manufacturing
Jean De Roches	— Secretary to the Manager of Engineering and Standards
Pat Cadeau	— Secretary to the Manager of Quality and Reliability
S. Stewart	— Secretary to the Manager of Plant Engineering and — to the Manager of C & P Lab/Standards.

3. The issue respecting the above individuals is whether they handle information which would place them in a position of conflict of interest as between their employer and the union. The evidence establishes that all of these individuals type and handle documents in the nature of business planning statements. These include periodic profit and loss statements, statements of departmental expenses, the company's estimate requests or appropriations requests, and forecasts of production schedules.

4. Handling such documents and information does not of itself make these individuals confidential in respect of labour relations matters. Some of the documents the secretaries handle are more detailed than others; some are extremely general. In each case the Board must determine whether the information handled by the individual secretary is sufficiently particular in respect of material labour relations information such as projected hirings, lay-offs or wages as to raise the likelihood of a genuine conflict of interest.

5. In this regard, the evidence of Mrs. King and of Pat Cadeau is significant. They type financial reports and budget material which contain statements of the amount budgeted for future clerical salaries. Although these amounts are stated in the form of an overall figure, percentages can be easily deduced from them. The knowledge of those projected rates of increase would obviously provide sensitive information going to the heart of the bargaining strategy and goals of the company. The Board must conclude, on the basis of their regular and material involvement with that information that Mrs. King and Pat Cadeau are not employees within the meaning of section 1(3)(b) of the Act and are therefore excluded from the bargaining unit.

6. The evidence in respect of Martha Bachtrog, Jean De Roches and Susan Stewart does not disclose regular and material access to the same kind of sensitive material. While they do handle profit statements, performance appraisals of employees, letters of discipline and long-range financial plans, they do not handle material that is confidential in respect of collective bargaining. The information which they have access to is information that will be generally available to the union, such as performance appraisals that are forwarded to employees. The business data that they process contains information that is too general to be of any particular value in collective bargaining, such as long-range business plans that appear to contain no particular statements about manpower requirements or wage estimates. They are therefore not excluded from the bargaining unit.

7. We turn to consider the status of the employees in the C & P Lab. There are nine persons employed in the C & P Lab. One of them, Mr. R. Chen, is a professional engineer. The parties agreed to the taking of a representation vote to determine the bargaining unit wishes of Mr. Chen and three other professional engineers pursuant to section 6(3) of *The Labour Relations Act*.

8. The eight other employees in the C & P Lab perform technicians' work, although some of them are referred to as "engineers". The Lab's function is to check incoming raw materials to see that they meet standardized specifications for the respondent's manufactured products. The Lab is also involved in overseeing the proper functioning of all production processes. While the Lab is isolated in one corner of the ground floor of the plant, its activities require the employees within it to maintain ongoing functional relationships with virtually all parts of the plant involved in the production process.

9. The evidence establishes that a number of the employees of the C & P Lab have been drawn from other technical positions within the plant. The four grade designation of employees in the C & P Lab are the same as are found elsewhere in the plant. The evidence establishes that the C & P Lab employees use skills similar to those of other technical employees in the respondent's operation. Their salaries and benefits are administered on the same basis as those of all other technical employees of the respondent.

10. The Board can see little, if any, basis to conclude that the employees in the C & P Lab have any separate community of interest from the respondent's other technical employees. The mere fact that they may use different apparatus, perform a slightly different function and operate in a particular corner of the plant is not a compelling basis to separate them for the purposes of collective bargaining. The C & P Lab personnel have the same background and general qualifications as technicians elsewhere in the respondent's plant. There is a substantial functional interdependence between their work and that of other technicians. There is, moreover, occasional interchange from the ranks of other plant technicians. In these circumstances, given the Board's normal aversion to the artificial fragmentation of bargaining units, the Board is satisfied that the C & P Lab employees have a sufficient community of interest with other employees in the respondent's plant to be included in the bargaining unit.

11. The Board considers next the status of Mr. Peter Johannisse. Designated a "field engineer" (although not a professional engineer within the meaning of the Act), Mr. Johannisse is principally involved in customer liaison. It is his function to identify and attempt to solve problems on equipment returned by unsatisfied customers. While there is a technical aspect to his work, his is in substantial part also a marketing and public relations function.

12. The evidence establishes that he is the only employee in the plant with a company car, and that he works out of the plant fully fifty per cent of his time. He has little functional interrelationship with any of the other technical or clerical employees of the respondent. While he is a salaried employee, he appears not to participate in the company-administered benefits programs.

13. Having regard to the totality of the evidence respecting Mr. Johannisse, the Board determines that he has no community of interest with other technical and clerical employees and should therefore not be included in the bargaining unit.

14. The Board considers next the status of Mr. R. Yates, employed by the respondent as

a Cost Analyst. He reports to the Cost Accounts Manager and is primarily responsible for the preparation of statements which give the company an idea of its performance. Specifically, he analyses the manufacturing performance of the plant in terms of material costs and labour costs incurred in production. His is essentially a reporting function that involves the gathering of data. It does not involve any independent power of decision in policy formulation or in areas that affect the jobs or job conditions of employees. He is, therefore, not managerial within the meaning of section 1(3)(b) of *The Labour Relations Act*. (*Canadian General Electric Company*, [1979] OLRB Rep. Jan 12; *Inglis Limited*, [1976] OLRB Rep. June 270; *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396; *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. Apr. 261).

15. The issue is whether he is confidentially employed in matters of labour relations. The evidence discloses that his regular duties do not involve any contact with individual personnel files or individual payroll figures. While he appears to have access to a broad range of documents, he does not, in the course of his duties, make use of payroll or manpower projections. The focus of Mr. Yates' attention is the past, and not the future. It is part of his job to determine what caused the problem when records show that production costs substantially exceeded what had been planned for.

16. Once a month Mr. Yates attends a plant performance meeting where cost figures are used as a basis for pinpointing shortfalls in the production system. While those meetings may, in very general terms, deal with the inefficiency of a particular department from a labour or equipment standpoint and might provide information that will be the basis for further staffing decisions by other members of management, the meetings do not themselves involve such decisions. Mr. Yates is, therefore, not exposed to specific decisions of management regarding hiring, lay-offs or alternative methods of production. On the basis of the foregoing evidence the Board cannot find that he exercises responsibilities which are confidential in matters of labour relations. Mr. Yates is, therefore, included in the bargaining unit.

17. The last issue is the status of a group of persons which, for the purposes of convenience, shall be referred to as "Technical Associates". The respondent maintains that these individuals exercise managerial functions within the meaning of section 1(3)(b) of the Act and that they lack a community of interest with the employees in the bargaining unit. By agreement of the parties, the evidence respecting Mr. D. Robertson, D. Archer, J. Thompson and H. Petersen is representative of the eleven persons concerned. These individuals work in several different parts of the respondent's plant. They are highly qualified technicians who generally have greater experience than the employees who work with them. For example, Mr. David Robertson has thirteen years' experience with the respondent. Now classified as a Technical Associate II, he has previously worked as a Technical Associate I, a Design Draftsman and a Junior Draftsman. Mr. Robertson works in a department that is responsible for producing an equipment design that is suitable to the production requirements established in the respondent's colour television tube production facility. In addition to the design function, his department is responsible for supplying a cost estimate for the equipment concerned, and requisitioning the material necessary. Mr. Robertson is also involved in assuring that the production equipment he is involved in designing is produced properly and in sufficient time for use in production.

18. Mr. Robertson has an expertise in designing, and much of his work involves making original design drawings which are then passed on to a draftsman who works with him for the production of a detailed drawing.

19. Two other persons in the same group, Dave Kemp and Don Murray perform functions similar to Mr. Robertson. They each have a draftsman working with them. While Mr. Robertson has some flexibility in setting work priorities, the choices that he makes are essentially predicated upon production requirements established by higher management. Mr. Robertson assigns work within limited parameters and does not generally with the knowledge and concurrence of his immediate supervisor, Mr. Don Legget, the Manager of Equipment Engineering Services.

20. Hans Petersen has also been employed for thirteen years with the respondent and is classified as a Technical Assistant II. Mr. Petersen works in the exhaust department where cathode ray tubes are vacuum pumped and sealed off. He is responsible for production engineering in that area and has three technicians working under him. The technicians who work under him are responsible for the analysis of scrap on each of the three shifts in the plant. They see to it that the technical controls are kept in order and oversee the machine attendants working on their shifts. It is Mr. Petersen's responsibility to instruct the three technicians as to what work is to be done, the method to be followed and the amount of work. Those factors, however, are all a function of production decisions taken at a higher level of management. Mr. Petersen's day is principally devoted to the preparation of daily and weekly reports, as well as monthly reports which provide the company with item percentages in respect of scrap.

21. None of the persons examined in the Technical Associate group has any substantial or continuing input into hiring, firing or disciplining employees. There appears to be only one isolated instance to the contrary. Mr. Robertson once interviewed a job applicant some years ago. The individual was hired after Mr. Robertson recommended that he be employed. On that occasion, however, the individual was also interviewed by someone else. On three other occasions Mr. Robertson attended the interview of job applicants in the company of his supervisor. This he did because he had a greater knowledge of the drafting design function than his manager.

22. All of the individuals examined have the ability to grant casual time off, usually on a one-day or part-day basis. They do not, however, have authority to grant extended leaves of absence nor do they exercise any decision-making power in respect of the assignment of vacations. Neither do they recommend wage increases or promotions. They are responsible for making an annual assessment of the work performed by the employees who work with them. They are also occasionally asked to comment on the ability or performance of individuals being considered for transfer or promotion. They appear not, however, to exercise a right of effective recommendation in that regard.

23. The only area where the Technical Associate group appear to have a power of effective recommendation is in the decision that overtime work is necessary. Even in this area, however, their assignment of overtime is sometimes ratified by more senior management. Although they do attend management meetings, these are generally not in respect of matters relating to labour relations, being more generally oriented to production schedules and plant projects.

24. In considering the status of the Technical Associates it is useful to review the decision of the Board in *Inglis Limited*, [1976] OLRB Rep. June 270. In that case the Board drew a distinction between three kinds of managerial functions. Persons may be managerial if their duties, like those of a foreman, involve immediate supervision of employees of a kind and

degree that gives them a direct control over the conditions of employment or the employment relationship of employees or, alternatively, gives them a power of effective recommendation in that regard. Managerial status also attaches to individuals who may not directly supervise employees, but who make policy decisions, or exercise a power of effective recommendation, in such matters as production methods or budgeting so that their decisions and recommendations impact directly upon the employees in a bargaining unit. A third category of managerial responsibility involves persons who exercise an independent decision-making authority in company policy, even though their decisions may not necessarily effect the terms and conditions of employment of any employees.

25. How do the members of the Technical Associates group size up when they are assessed by those three standards? There is no suggestion in the evidence that the individuals concerned exercise an independent decision-making authority at any substantial policy-making level of the respondent's operations. They function essentially as conduits of production policy decisions made by higher management. The flexibility which they exercise in the assignment of work and the determination of priorities within their departments is a natural function of their professional and technical expertise. It does not, however, establish any management attributes resembling the determination or even the influencing of company policy.

26. The decisions which they make are likewise essentially mechanical in nature. They are decisions as to how best accomplish a production task or assignment dictated by their superiors. Their decisions in that regard do not alter the complement of the work force, nor do they in any way influence the terms and conditions of employment of any of the respondent's personnel. They do not, in other words, make policy decisions or effective recommendations that would place them in a position of conflict of interest if they were to be included in the bargaining unit.

27. It is likewise clear that while they may oversee the work of other technical employees, they do not exercise a degree of supervisory authority that would make them managerial. The annual performance reports which they make in respect of other technical employees are in the nature of data to assist the decisions made by members of higher supervisory ranks. They have no decision-making authority in respect of promotion, raises, discipline or discharge, nor do they exercise a power of effective recommendation in those areas. In their everyday relationship with the technical employees who work with them, they are an integral part of a working team, responsible for giving technical guidance and direction to draftsmen and technicians who work with them. In this regard they are practically indistinguishable from the product engineers described in paragraph 23 of the *Inglis* decision, *supra*, who are there found to be employees within the meaning of section 1(3)(b) of *The Labour Relations Act*.

28. For the foregoing reasons, the Board concludes that the individuals within the Technical Associates group are employees within the meaning of the Act. The Board must next consider whether these Technical Associates should be excluded from the bargaining unit but virtue of a separate community of interest. The evidence establishes that the departments in which they work have an ongoing functional coherence with practically all departments in the respondent's plant. The evidence also establishes that there is a continuing interchange of employees between the departments in which the Technical Associates group are employed and other departments whose employees are in the bargaining unit. Having regard to the

totality of the evidence the Board is not satisfied that this group has an independent or separate community of interest from that of other technical employees in the bargaining unit. Therefore they should not be excluded from the bargaining unit.

29. The Board's interim certification of the applicant therefore extends to include all of the foregoing persons with the exception of Ms. L. King, Secretary to the Manager of Financial Operations, Ms. Pat Cadeau, Secretary to the Manager of Quality and Reliability and Mr. Peter Johannisse, Field Engineer.

30. The only issue remaining to be resolved is whether the professional engineers wish to be included in the bargaining unit. Having regard to the agreement of the parties the Registrar is instructed to conduct a vote in that regard. The engineers concerned will be asked whether they wish to be included in the bargaining unit that is the subject of this application, or whether they wish to be included in a separate bargaining unit composed exclusively of engineers.

0795-80-R Seafarers' International Union of Canada AFL-CIO-CLC,
Applicant, v. **Royal Hydrofoil Cruises (Canada) Limited**, Respondent,
v. Group of Employees, Objectors.

Constitutional Law – Employer carrying passengers from Toronto to Niagara by hydrofoil – Travelling through American territorial waters – Provincial jurisdiction

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

***APPEARANCES:** Roger Desjardins and William Ross for the applicant; Moira M. Trask, A.F. Atherton and David Kent for the respondent; Cathie Ryley, John McKenzie, Ted Hanlan and Marion Seymour for the objectors.*

DECISION OF THE BOARD; September 1980

1. This is an application for certification.

2. The respondent, Royal Hydrofoil Cruises (Canada) Limited is in the business of transporting passengers by hydrofoil between Toronto and Niagara-on-the-Lake. Both points are located in the province of Ontario. However, the course of the hydrofoil, for nautical reasons, runs for approximately half its length through waters of Lake Ontario actually falling within the territorial boundary of the United States of America. The Board accordingly was required to address itself to the question as to whether or not it had the jurisdiction to entertain the present application, even though the parties themselves were in agreement that the Board had jurisdiction.

3. By virtue of section 91(10) of *The British North America Act*, power over the area of "navigation and shipping" is allocated to the Federal government of Canada. This power must

be read subject, however, to sections 92(10)(a) and (b) of the Act, which excludes from provincial control:

- “(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Province, or extending beyond the limits of the Province.
- (b) Lines of Steamships between the Province and any British or Foreign Country.”

As the Supreme Court of Canada stated in *Agence Maritime Inc. v. Canada Labour Relations Board* (1969), 12 D.L.R. (3d) 722, at page 728:

“... regardless of how liberally the powers conferred upon Parliament by section 91(10) of the *British North America Act* must be construed, according to the judgment of the Privy Council in *City of Montreal v. Montreal Harbour Commissioners*, [1926] 1 D.L.R. 840, [1926] 1 W.W.R. 398, [1926] A.C. 299, I am of the opinion, that in a case of the type presently before us, and, except insofar as the shipping aspect of the matter is concerned, the provisions of section 91(29) and section 92(10)(a) and (b) are collectively intended to exclude from the jurisdiction of Parliament maritime shipping undertakings whose operations are carried on entirely within the boundaries of a single province.”

Reference in the decision was also made to what was then section 53 of the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, but the reasoning in the decision does not appear to be dependent upon such reference.

4. Accordingly, the question before the Board is whether the respondent's operations can be said to be “carried on entirely within the boundaries of a single province”. This is not dissimilar from the actual issue before the Courts in *Agence Maritime*. There the employer was in the business of transporting cargo by water between various points in the province of Quebec. One of the grounds argued in support of federal jurisdiction was that by travelling on the St. Lawrence river from the City of Quebec to the Town of Gaspe, the employer's ships necessarily crossed the boundaries of the “inland waters of Canada” as that expression is defined in, and for the purposes of the *Canada Shipping Act*, R.S.C. 1952, c. 29, section 2, subsection 41. It is not clear from either the decision or the statute how one is to describe the waters which lie outside the “inland waters of Canada”, but in any event it appears clear that such waters fall outside the territorial limits of the province of Quebec. Notwithstanding this, the Supreme Court of Canada commented, albeit *obiter*, at p. 728:

“... I cannot see how leaving the inland waters to travel from one point to another in the same province constitutes going beyond the boundaries of that province, within the meaning of section 92(10) of the *British North America Act*...”

5. Similarly, in the present case, the single item in the facts before the Board which raises the suggestion of federal jurisdiction is the happenstance of choosing a route which

passes through, in open lake, a portion of the territorial waters of the United States of America. There is, so far as we know, no ordinary contact whatever with American authorities at any state of the trip as a result of this route. Passengers embark at one Ontario port and, after crossing the open water of the lake, disembark at another. The course taken is a matter of choice for the respondent, and it appears to the Board that the constitutional value of the respondent's undertaking, on these facts, must surely depend on more than the precise route the respondent happens to choose at a given point in time. The Board therefore finds nothing in the facts to oust the jurisdiction of the province with respect to the labour relations of the respondent's undertaking. These proceedings will accordingly continue.

0363-80-R; 0412-80-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **Square D Canada Electrical Equipment Inc.**, Respondent, v. **Square D Employees' Association**, Intervener.

Certification – Trade Union Status – Employee association obtaining union status – Certification applications filed by competing unions – Employer demonstrating preference for one applicant – Whether receiving employer support

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. D. Bell and H. Simon.

APPEARANCES: Art Jenkyn, George Stevens and Bruce Schweitzer for the applicant; Keith Billings, Carl Sheppard and Dave Thomas for the respondent; Michael G. Horan for the intervener.

DECISION OF VICE-CHAIRMAN, D. E. FRANKS, AND BOARD MEMBER H. SIMON; September 15, 1980

1. The name: "Square D Company Canada Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Square D Canada Electrical Equipment Inc.
2. On May 16, 1980 the applicant, United Electrical, Radio and Machine of America (UE), applied for certification. The terminal date set for that application (Board File #0363-80-R) was May 27, 1980. Subsequently, on May 26, 1980 the intervener, the Square D Employees' Association, made a separate application for certification (Board File #0412-80-R). Having regard to section 92(3)(a) of *The Labour Relations Act*, these applications are hereby consolidated.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.
4. The intervener, having applied for certification, is required to establish its status as a trade union within the meaning of section 1(1)(n) of the Act. The applicant alleges, however, that the respondent employer has violated section 12 of the Act and the Board is thus proscribed from certifying the intervener in this matter.

5. In order to establish its status as a trade union for the purposes of section 1(1)(n) of the Act, the intervener adduced evidence concerning the formation of the Square D Employees' Association at a meeting at the Holiday Inn in Kitchener on the 22nd of May, 1980. The minutes of the meetings were filed with the Board as was a copy of the constitution adopted at that meeting. On the basis of the evidence before the Board concerning that meeting, the Board finds that the intervener has established its status within the meaning of section 1(1)(n) of the Act.

6. The applicant alleges, however, that because of the employer's conduct in this matter, section 12 of the Act prohibits the Board from certifying the intervener as a bargaining agent. That section provides as follows:

"The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin."

7. On the afternoon of May 13, 1980, Mr. David Thomas, the plant manager of the respondent, assembled the employees of the respondent at a meeting and read to them from a prepared text which was filed with the Board at the hearing. The text of his remarks reads as follows:

"A number of employees have indicated to me that they have been approached by union representatives. Some of these employees have questioned the reason for the company remaining silent on this issue.

I would like to say that prior to relocating into Waterloo, Company representatives came into this area to take a survey of wages and benefits. What has been established here is the result of this survey.

Lowest hourly rate is 5.19/hour

Highest hourly rate is 7.54/hour

How many companies in Waterloo can match these rates?

Square D pay 100% of OHIP

100% of Group Insurance Plan.

Have 12 stat. Holidays + an excellent vacation plan

Bereavement allowance

Jury Duty allowance

If employees feel that they have other problems or complaints they are certainly entitled to have these mutually resolved.

This could be achieved by (1) individuals meeting with their supervisor or manager (2) Employees forming an Employee Committee and (3) if neither of these were to satisfy the employees then a Union could be the answer. If employees feel that a union is the only answer to their problems then that is your right, but please make sure that the union

selected is one that will act 100% on *your* behalf.” (emphasis indicated in notes)

The evidence is that after finishing these remarks, Mr. Thomas added that he would answer no questions in relation to his statement. There is a substantial conflict between the evidence given by witnesses for the applicant and Mr. Thomas. A number of witnesses for the applicant say that Mr. Thomas added that if anyone wanted to talk to him about this matter, they could come and see him afterwards. Mr. Thomas, however, denies having made such an invitation.

8. Two days later on May 15th, the evidence is that a petition was circulated around the respondent's premises to the effect that a shop association should be set up by the employees. The Board heard evidence concerning the conduct of two employees involved with this petition.

9. The evidence of Sandra Pinkerton is that on the afternoon of May 15th, just before the afternoon break an employee, Fred Buck, approached the employees in her department at their work stations. He asked them to sign the petition in favour of a shop association. At the time when Buck was in the area, the foreman, Weber, was at his desk which is in the area. Her evidence is that Buck was with the group of employees for a sufficient length of time that Weber, the foreman, would have been aware of his presence. Weber, however, said nothing concerning this disruption of work in his area. The witness regarded this as an unusual event since as a foreman, he does not allow talking in his area.

10. The other incident in relation to this petition involves Ken Lenhart. There is some dispute about Lenhart's status as an employee. The position of the respondent is that Lenhart is a lead hand. The applicant disputes this and claims that he is a foreman or is sufficiently close to being a foreman as to be perceived by employees as part of management. Mr. Thomas, in his evidence, denied that Lenhart is a foreman. This is supported by other evidence which confirms that Lenhart does not wear a distinctive jacket of a foreman and that he punches a time card. The respondent also tendered a description of the duties of lead hand, however, such a document is of little value since apparently it was never shown to Lenhart, although Lenhart on occasion been a lead hand in the respondent's Toronto operation.

11. On the other hand, the union called evidence to the effect that Lenhart regularly issues instructions to employees. In one particular area certainly, the employee who gave evidence had no contact with the person who is claimed to be the foreman in his area. His only contact with management had been with Lenhart. Lenhart has a desk as do the foreman. Certainly, Mr. Lenhart has a unique status since it appears there are five foremen and he is the only lead hand in the plant. Indeed, the evidence of Mr. Lenhart's unique status is confirmed by Mr. Bruce Schweitzer who suggested that Mr. Lenhart has good connections since he goes to lunch with the foremen and comes back a half an hour late.

12. Of singular interest is an event which occurred while Mr. Lenhart was circulating the petition to form a shop association. The evidence of Stewart Dool is that on May 15th, just after lunch, Lenhart came to his area and called a group of employees together. In the course of discussions concerning the formation of a shop association, Joe Schaffer, who later became the president of the intervener, asked Lenhart what would happen if they did not sign the petition. Would management know that they were with the UE? Lenhart replied, yes they would know. Not surprisingly, all the employees in the area signed the petition to form a shop

union. This evidence was not denied and in fact Mr. Lenhart was not called as a witness in this case.

13. On Friday, May 16, Lenhart and others called a meeting of the employees in the plant at noon hour. The meeting was held in the parking lot adjacent to the respondent's plant. The meeting was chaired by Lenhart and there was a substantial discussion concerning the formation of a shop association, as a result of which, a committee was struck. They in turn contacted a solicitor and the events of May 22nd, referred to in paragraph 4, resulted in the formation of the intervener association.

14. The Board also heard evidence of two subsequent events concerning the conduct of Joseph Schaffer and Randy Sacks after the formation of the intervener on May 22nd. The evidence of Bruce Schweitzer is that on May 23rd, in the afternoon, Randy Sachs spent a good ten to fifteen minutes talking to two employees in the presence of one of the foremen, Mr. Bierzniac, apparently, Bierzniac did not interfere with the discussions notwithstanding the recent instructions concerning such activity. In his evidence, however, Mr. Sachs denied that he engaged in any organizing activity for the intervener during working hours.

15. The other event concerns Mr. Schaffer, the president of the intervener, who was seen signing up an employee on the morning of May 26th. The employee was at her work station, however, there is some dispute as to whether the work day had started or not.

16. Section 12 of *The Labour Relations Act* deals with conduct of an employer. Counsel for the intervener suggests that there is no evidence whatsoever of any direct support by the respondent for the intervener association. He further points out that most of the events dealt with in the evidence relate to a time when the intervener trade union didn't exist. Counsel for the respondent points out that in an allegation under section 12 there is no onus on the employer to prove his innocence and that there was no clear evidence of management's knowledge of the events in question.

17. The applicant argues that the events must be taken as a whole and dealt with as a matter of timing and atmosphere.

18. Although Mr. Thomas's speech is a very carefully worded and guarded statement, there is no doubt that the employer's preference was made quite clear given the context of that speech. The opening remarks can only be interpreted as a reference of the organizing campaign of the applicant trade union. Thus, the concluding remark that the union selected should be one which would "act 100% on *your* behalf" can only reasonably be interpreted as a preference against the applicant UE and in favour of an employee committee. In his evidence, Mr. Thomas did not deny the emphasis of his remarks. In the circumstances then, the respondent employer made it quite clear to all the employees in its plant what its specific preferences and its dislikes were.

19. Two days later Lenhart, Sachs and perhaps others circulate a petition. In his evidence, Mr. Sachs was quite clear that the idea for a shop association came from Mr. Thomas's speech. This petition is circulated during working hours, in one instance certainly, in front of a foreman, and no response was made by the employer. In the other instance, Mr. Lenhart clearly informs a group of employees that the employer will learn of their intentions with respect to that petition. Mr. Lenhart is perceived by the employees to be

related to the management of the respondent, and no denial of Mr. Lenhart's conduct is made either to the employees or for that matter in evidence before the Board. It is significant that Mr. Lenhart was not called as a witness and asked whether or not he was on a "frolic of his own". Taken as a whole, the events of the 15th of May in the employer's plant are a clear indication to the employees that the employer condones the formation of a shop association.

20. Lenhart's final act with relation to the association is to conduct the meeting in the parking lot on Friday, May 16th. Lenhart ceases to be involved with the intervener leaving it completely in the hands of Schaffer and Sachs.

21. Subsequently, after the formation of the intervener, Sachs and Schaffer are perceived by the other employees to be moving around the plant during working hours talking to employees.

22. We are of the view that the conduct of the employer in the week prior to the actual formation of the intervener was such as to create an atmosphere in the plant where the employees perceived a clear preference for a shop association rather than the applicant trade union. This is surely the natural consequence of Mr. Thomas's speech and the condoning by the foreman of the circulation of the petition in the plant during working hours. We find it hard to believe that in a plant of this size that the respondent was not aware of the atmosphere that was generated during the week in question.

23. Clearly, the events in the plant must be viewed in their totality. While it is clear that section 56 of the Act allows an employer to express his views, the speech to the employees set out in paragraph 6 above can only be interpreted as expressing a clear desire by the respondent to have its employees represented by a "shop association" rather than the applicant trade union. Having established this preference, the respondent allows Lenhart to circulate his petition for a shop association throughout the plant during working hours. To the employees in the plant, such an open condonation of Lenhart's behaviour becomes a clear indication to them that Lenhart — regardless of his employment status — is acting on behalf of their employer. Further, no attempt is made by the employer to dispel this impression. We are, therefore, prepared to find that the employer supported the creation of the intervener employee association.

24. Clearly, such support in favour of one trade union in preference to another falls within the meaning of "other support" within section 12 (see for instance the *Trent Metals* case, [1979] OLRB Rep. Aug. 827).

25. For the foregoing reasons, the intervener's application for certification is therefore dismissed.

26. With respect to the appropriate bargaining unit, the parties are in dispute over whether or not persons occupying the positions of Quality Control Technicians should be included in or excluded from the bargaining unit. The employer claims that the persons in this category have a community of interest with the engineering staff and should, therefore, be excluded from the bargaining unit. In view of the disagreement, the Board shall appoint a Board Officer to inquire into the appropriateness for inclusion into the bargaining unit of those employees in the disputed classification.

27. The Board has determined, however, that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the Quality Control Technicians. On the basis of all the evidence before it, the Board is satisfied that in either event more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 27, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

28. Accordingly, the Board, pursuant to its discretion under section 6(1a) of the Act and pending the final resolution of the composition of the bargaining unit, certifies the applicant as the bargaining agent for all employees of the respondent in Waterloo, save and except foremen, persons above the rank of foreman, office and clerical staff, sales staff, engineering staff, persons employed for not more than 24 hours per week, students regularly employed during school vacation periods and, pending the resolution of the dispute over the inclusion of Quality Control Technicians excluding as well the Quality Control Technicians.

29. A formal certificate must await the final determination of the appropriate bargaining unit.

DISSENT OF BOARD MEMBER J. D. BELL:

1. I do not agree with the decision of the majority of the Board to dismiss the intervener's application for certification.

2. The Square D Employees' Association has met the Board's criteria to establish its status as a trade union within the meaning of section 1(1)(n) of the Act. This took place at the meeting held by the employees at the Holiday Inn on May 22, 1980 with their solicitor in attendance.

3. There is no evidence before the Board of any employer participation in the solicitation for membership in the intervenor which, in my opinion, can be considered "other support" within the meaning of section 12 of the Act.

4. The Board is faced with the following question: "Who does have the support of the employees of Square D?" This question can best be determined by conducting a representation vote by secret ballot giving the employee a choice between the applicant, the intervener or no union.

5. I would direct such vote be conducted by the Board.

0799-80-R Hotel, Restaurant and Cafeteria Employees' Union, Local 75 Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L. – C.I.O. – C.L.C.), Applicant, v. **Toronto Airport Hilton** a division of Toronto Hilton Inc., Respondent.

Bargaining Unit – Certification – Membership Evidence – Rationale for excluding part-timers and students from full-time unit – Applicant local created out of amalgamation of two other locals – Membership cards signed after amalgamation in name of predecessor – Whether evidence of membership in applicant – Whether uncertainty causing Board to order vote

BEFORE: R. D. Howe, Vice-Chairman, and Board Members T. G. Armstrong and M. J. Fenwick.

APPEARANCES: *Alick Ryder Q.C., for the applicant; Robert A. MacDermid, Robert Hassell and Susan Dalton for the respondent.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER T. G. ARMSTRONG; September 3, 1980

1. The name: "Airport Hilton Toronto" appearing in the style of cause of this application as the name of the respondent is amended to read: "Toronto Airport Hilton a division of Toronto Hilton Inc."
2. This is an application for certification.
3. In *Royal Canadian Yacht Club* (File No. 0780-80-R, dated August 5, 1980, as yet unreported) the Board found the applicant to be a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*. By virtue of section 94 of the Act, such finding is *prima facie* evidence in the present proceedings that the applicant is a trade union for the purposes of the Act. Counsel for the respondent questioned the trade union status of the applicant, which was created on June 1, 1980 by a "merger" of Locals 299 and 254 of the Hotel and Restaurant Employees' and Bartenders' International Union, on the ground that some of the persons who joined Local 299 prior to June 1, 1980 were not notified of the proposed "merger". (Local 75 appears to have become the successor of Locals 299 and 254 through an amalgamation [which involves the combining of two or more entities so as to form a distinct, new entity] rather than a merger [which involves the absorption of one entity by another whereby the former ceases to exist while the latter continues], see section 54 of the Act; *Hydro Electric Power Commission of Ontario*, 57 CLLC ¶18,080 [in which the Board noted that in trade union circles, the terms merger and amalgamation are often used interchangeably and *Consolidated Glass Industries*, 62 CLLC ¶16,220]. Nevertheless, the term "merger" will be utilized throughout this decision since that is the term contained in the documentation concerning the succession in question.) However, having regard to all the submissions (which counsel agreed would be treated by the Board as proof of the facts alleged therein) and the evidence before it, including the Constitution of the Hotel and Restaurant Employees' and Bartenders' International Union, and the Declaration and Order for Merger of Locals 299 and 254, the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.
4. With respect to the bargaining unit, counsel for the applicant requested the exclusion of persons regularly employed for not more than 24 hours per week and students em-

ployed during the school vacation period in accordance with the Board's usual practice. Counsel for the respondent, on the other hand, submitted that neither of those groups should be excluded. In support of this contention, he submitted that the "twenty-four hour line" creates "an artificial distinction" since only a few of the respondent's employees work forty hours per week and since some work slightly over twenty-four hours one week but then work slightly under twenty-four hours another week. He contended that all of the employees of the respondent share a community of interest and noted that all are paid the same wage rate for serving customers. He further submitted that university students and second income earners now have a stronger commitment to the work force than they used to have. His submissions on this issue culminated in a request that the Board appoint a Labour Relations Officer to inquire into and report to the Board on the community of interest between the groups in question.

5. In response to those submissions, counsel for the applicant argued that the Board's long-standing and well established practice concerning part-time employees and students is known to and relied upon by the parties which come before the Board. He stated that the applicant, in reliance upon this practice, had organized only the full-time employees of the respondent. Thus, a departure by the Board from its normal practice would defeat the application and disappoint the large number of full-time employees of the respondent who desire to be represented by the applicant. Counsel for the applicant further submitted that the Board's practice is based upon the fundamental difference between the part-time and full-time employees which results from the fact that persons who regularly work less than twenty-four hours per week generally do so because they want to have free time to discharge other responsibilities.

6. The Board's general practice concerning exclusion of part-time employees and students from full-time bargaining units is set forth in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. Mar. 324. (See also *The Post Printing Company Ltd., a division of Thomson Newspapers Limited (Leamington)*, [1966] OLRB Rep. Mar. 930; *Premier Plastics Limited*, [1969] OLRB Rep. July 508; *Wilson-Munroe Company Ltd.*, [1973] OLRB Rep. Dec. 647; and *The Beacon Herald of Stratford Limited*, [1975] OLRB Rep. Feb. 103.) This practice reflects the Board's view, supported by the extensive labour relations experience and knowledge of its members, that part-time employees and students, on the one hand, and full-time employees, on the other hand, do not generally share a community of interest since the former are primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability, and other benefit plans; extensive seniority clauses; and other long-term benefits. See, for example, *Leon's Furniture Limited*, [1976] OLRB Rep. May 232, paragraph 5, in which the Board stated:

"... we have learned through experience in such applications that part-time employees do not share a community of interest with full-time employees in many aspects of the collective bargaining scenario. More precisely part-time employees are more pragmatically concerned with immediate as opposed to long-term benefits with respect to improving their terms and conditions of employment. In applying this proposition to more practical issues the part-time employee usually prefers to sacrifice long-term pension, medical and other welfare benefits for a more substantial increase in wages or a longer vacation period. The nature of se-

niority provisions contained in a collective agreement with respect to promotions, transfer and lay-offs does not always assume the same degree of significance to the part-time employee as it would to the full-time employee. In other words, the Board had discerned a natural, inevitable schism in measuring the community of interest between the two categories of employees that invite separation into peculiar bargaining units ...”

7. For the foregoing reasons, part-time employees and students generally tend to have less initial interest in collective bargaining. Moreover, since the union organizing campaign may give rise to considerable uncertainty and apprehension among part-time employees and students with respect to the continued accommodation of their particular needs and desires for a convenient work schedule and maximum short-term remuneration, they are prone to oppose applications for certification. Such opposition could preclude full-time employees from engaging in collective bargaining if the Board generally exercised its discretion under section 6(1) of the Act in favour of bargaining units which included not only full-time employees but also part-time employees and students. Accordingly, the Board’s practice concerning part-time employees and students is not only a policy designed to avoid difficulties which may arise where groups with separate communities of interest are included in a single bargaining unit, but is also an organizing rule which promotes the public interest, identified in the preamble of *The Labour Relations Act*, in furthering harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

8. Having regard to the submissions of the parties and the Board’s general practice concerning the bargaining unit issue in dispute in the present case, the Board finds that all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales, accounting and front desk staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The applicant submitted membership evidence consisting of ninety-seven combination application and receipt cards, each of which indicates that it is an application for membership in “Hotel and Restaurant Employees’ and Bartenders’ International Union, Local No. 299”. As noted in paragraph 3 of this decision, the applicant was created on June 1, 1980, by a “merger” of Local 299 and Local 254 of the Hotel and Restaurant Employees’ and Bartenders’ International Union. The following paragraphs are included in the aforementioned Declaration and Order for Merger of Locals 299 and 254:

“1. Subject to the following terms and conditions, the Hotel and Club Employees Union Local 299 and the Restaurant, Cafeteria and Tavern Employees Union Local 254 shall merge and form a new union to be known as the HOTEL, RESTAURANT AND CAFETERIA EMPLOYEES UNION LOCAL 75 of Toronto, Ontario, Canada, AFL-CIO and CLC (hereinafter ‘Local 75’).

2. The merger shall become effective on June 1, 1980.

• • •

9. Local 75 shall be the successor in interest to all assets, property, rights, liabilities and jurisdiction of Hotel and Club Employees Union Local 299 and Restaurant, Cafeteria and Tavern Employees Union Local 254. All funds of former Locals 299 and 254 shall be transferred into and made a part of the general fund of Local 75.

• • •

12. All members of Locals 299 and 254 automatically shall become members of Local 75 upon the effective date of the merger and their membership status shall remain unbroken as a result of this merger.

13. Local 75 shall, consistent with its bylaws and this Declaration and Order for Merger, take all necessary and appropriate action to implement the merger and smoothly effect the transition of Locals 299 and 254 into one merged local union.”

In view of this evidence of transfer of membership filed with the Board, the Board is satisfied that the twenty-four cards dated prior to June 1, 1980 constitute valid evidence of membership in the applicant (see *Swansea Construction Co. Ltd.*, [1965] OLRB Rep. Mar. 645). However, the validity of the seventy-three cards dated after June 1, 1980 is somewhat problematic. Each of those cards purports to be an application for membership not in the applicant but rather in one of the applicant’s predecessors, “Hotel and Restaurant Employees’ and Bartenders’ International Union Local No. 299”. After the merger” occurred, “75” was written on many of those cards as the “Local No.” However, before the cards were signed, “75” was erased and “299” was written in its place. The reason for this change was that the organizers were of the view that all of the cards should specify “299” as the “Local No.” because the organizational campaign commenced before the “merger”.

10. Counsel for the applicant contended that the Board has power to accept the cards dated after June 1, 1980 as valid evidence of membership in the applicant and that the Board should do so to avoid cost to the applicant, confusion to the employees, and disruption to the business. He argued that the inscription of “299” on the cards instead of “75” did not create any confusion in the minds of the employees since the applicant was at all material times the only organizing entity operating in the area with a name that bears any resemblance to the name which appears on the cards. He argued that the “merger” was of no significance to the employees, who, he submitted, were concerned only with joining the organization represented by Mr. F. Ragni (the chief organizer). Counsel also argued that it was significant that although the Form 5 Notice to Employees of Application for Certification and of Hearing, which clearly indicates the applicant to be Local 75, had been duly posted on the respondent’s premises, none of the employees affected by the application has expressed any concern to the Board concerning the application or the validity of the membership evidence.

11. Counsel for the applicant cited *La Palme & Sons*, 56 CLLC ¶18,034, in support of the validity of the membership evidence. That case involved an application for certification filed and supported by combination applications and receipts for membership in “International Union of Mine, Mill & Smelter Workers Local No. 902”. All of the cards bore dates after November 29, 1955, the date of which Local 902 ceased to be a part of the International Union of Mine, Mill and Smelter Workers, and became a part of the organization of the Inter-

national Union of Mine, Mill & Smelter Workers (*Canada*) (emphasis added). Although the word “(Canada)” was omitted from the name of the union which appeared on the cards, the Board found that the cards constituted “some evidence” that the employees intended to become members of the Canadian organization, but ordered a representation vote because there remained “an element of doubt”. In reaching this decision, the Board reasoned as follows:

“As we have pointed out in the *Port Colborne Hospital Case*, the Canadian organization of the International Union of Mine, Mill and Smelter Workers was established on November 29, 1955, the date when the referendum vote pertaining to the Canadian Constitution was taken. Local 902 of the ‘International Union’ thereupon ceased to be a part of the ‘International Union’ and became a part of the Canadian organization by virtue of Article 7, section 2, of the International Constitution and the provisions of the Canadian Constitution. As we have seen, the ‘International’ no longer functions in Canada. Since the employees who signed the membership cards, submitted by the applicant in support of its application, did so at a time when the only organization operating in Canada which was known as the International Union of Mine, Mill & Smelter Workers was the Canadian organization bearing that name, there is some evidence before the Board that they intended to become members of the Canadian organization of which the applicant is a local union. However, in view of the wording of the application cards and the receipts and in view of the short interval of time that had elapsed between the date of the adoption of the Canadian Constitution and the date when the cards were signed there remains an element of doubt on this score. To resolve that doubt we are of opinion that we should seek the confirmatory evidence of a representation vote in this case.”

Counsel argued by analogy that the applicant was the only organization operating in the area at the time the cards were signed which had a name which bore any resemblance to the name which appeared on the cards.

12. Counsel for the respondent contended that the membership evidence was invalid and that, accordingly, the application should be dismissed. In support of this argument, he submitted that the Board’s jurisprudence is clear that membership in one local is not membership in another local. He also maintained that the membership evidence dated after June 1, 1980, does not fulfill either of the two aspects of the definition of “member” set forth in section 1(1)(j) of the Act, namely, application for membership in *the* trade union and payment to *the* trade union of at least \$1.00 in respect of the initiation fees or monthly dues of *the* trade union. He further argued that it is not possible to “look behind” the cards to consider what the individual employees may have intended since this would be contrary to the scheme of the legislation which is designed to preserve secrecy as to union membership and to ensure that membership cards will be submitted in a form worthy of being relied upon by the Board.

13. It is clear from the Board’s jurisprudence that evidence of membership in a local trade union other than the applicant local trade union is not satisfactory evidence of membership. As stated in *J.D. Carrier Shoe Company Limited*, [1968] OLRB Rep. April 54, “[i]t has been the Board’s consistent practice to find that membership in one local does not constitute

membership in another local ...” (See also *J. D. Coad Construction*, [1969] OLRB Rep. Sept. 755; *Dietrick & Koehler Construction Limited*, [1968] OLRB Rep. Oct. 728; *Prestige Drywall*, [1968] OLRB Rep. April 59; *Beaver Foundation Ltd.*, [1967] OLRB Rep. Oct. 652; *Northern Flooring*, [1966] OLRB Rep. Feb. 822; and *O.J. Gaffney Limited*, [1965] OLRB Rep. Dec. 641.) However, it appears that in each of those cases, the local trade union to which the membership evidence purported to relate and the applicant local trade union were both in existence at the time the membership evidence was collected and at the time of the application. Thus, there was a substantial risk in each of those cases that the membership cards could reasonably cause the person signing them to be misled or confused as regards the applicability of those cards to the applicant local trade union, since at the time the cards were signed it was quite feasible that the employee could join either the applicant local trade union or the local trade union to which the membership evidence purported to relate. By way of contrast, in the present case at the time the cards in question were signed, Local 299 had ceased to exist by virtue of the June 1, 1980 “merger”. Therefore, it was not feasible for the employees to join Local 299; the only local which they could in fact join was the applicant, which was the only local operating in the area in question with a name bearing any resemblance to the name on the cards. Moreover, any employee who had inquired would have learned that Local 299 had become part of Local 75 through the “merger”. The fact that no employees intervened in this application after the Form 5 Notice was posted showing Local 75 as the applicant, also suggests that the employees intended to become members of the applicant by signing cards which, as a result of an administrative error, bore the name of the applicant’s predecessors.

14. Having regard to all the submissions and evidence before it, the Board, by analogy to the *La Palme & Sons* case, *supra*, finds that there is some evidence that the employees in question intended, by signing cards bearing the name of one of the predecessors of the applicant, to become members of the applicant and were accepted by the applicant as members. The definition of “member” contained in section 1(1)(j) of the Act does not preclude this finding since it is not an exclusive definition; it merely provides that “member”, when used with reference to a trade union, *includes* a person who has done the acts specified in paragraphs (i) and (ii) thereof.

15. Section 92(2)(j) empowers the Board to determine the form in which evidence of membership in a trade union shall be presented to the Board on an application for certification. Accordingly, it is within the Board’s power to accept evidence of an application for membership in and payment of \$1.00 to one of the predecessor local trade unions of the applicant local trade union as evidence of membership in the applicant local trade union, particularly where, as in the present case, the Declaration and Order for Merger makes the applicant local union successor in interest of all rights and jurisdiction of the predecessor local trade unions, specifies that all funds of the predecessor local trade unions shall be transferred into and made part of the general fund of the applicant local trade union, provides that all members of the predecessor local trade unions shall automatically become members of the applicant union, and recognizes that there will be a period during which the transition of the predecessor local trade unions into one merged trade union will occur.

16. Thus, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 25, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under sec-

tion 7(1) of the said Act. However, since the use of the name of one of the applicant's predecessor local trade unions on the cards in question casts some doubt upon the intentions of the employees in question, the Board, in the exercise of its discretion under section 7(2) of the Act, hereby directs that a representation vote be taken of the employees of the respondent in the bargaining unit. All employees in the bargaining unit described in paragraph 8 hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

17. This matter is referred to the Registrar.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent.
 2. The applicant union has filed the required number of membership cards entitling it to automatic certification.
 3. My colleagues have reservations about the validity of some of the membership cards. Counsel for the applicant union explained the change in local number on some of the cards was an honest mistake arising out of procedural confusion caused by the merger of Locals 299 and 254 into a new entity; Local 75. I accept his explanation.
 4. No employees filed a statement of desire in response to the Board's notice of the application.
 5. In addition the declaration on merger provides for the tying of any loose ends resulting from the amalgamation of the two locals including acceptance of membership cards of both locals.
 6. No useful purpose would be served in putting Local 75 to the expense and delay of a representation vote. I would have certified Local 75 without a representation vote.
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0939-80-U Local 1979 Retail Clerks International Union Affiliated with the Canadian Labour Congress, AFL-CIO., Applicant, v. Wilson Automotive (Belleville) Ltd., Respondent.

Duty to Bargain in Good Faith – Union and Company agreeing on final offer – Company demanding ratification vote – Whether entitled to vote – Whether refusal to execute agreement until vote is bargaining in bad faith

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. F. Rutherford and F. W. Murray.

APPEARANCES: *Ian E. Reilly, R. Mastin, and W. Kritsch for the applicant; R. D. Perkins for the respondent.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER
W. F. RUTHERFORD; September 30, 1980**

1. This is an application under section 14 of *The Labour Relations Act*. The complainant alleges that the respondent has bargained in bad faith and requests the Board to direct the respondent to sign a proposed collective agreement which the respondent has offered but refuses to execute until all employees in the bargaining unit have voted on its acceptance.

2. In this application the recent amendments to *The Labour Relations Act* contained in Bill 89 arise for initial consideration. The Board must determine whether the scope of the employer's right to request a vote on his last offer extends to the circumstances of this case, namely where the union has already accepted the company's offer. If it does the employer would be asserting a statutory right and would not, as the union alleges, be bargaining in bad faith.

3. The parties agreed on the following facts:

- (1) The applicant was certified on March 23, 1979 and filed notice to bargain on March 29, 1979 after which the parties commenced to bargain.
- (2) On July 5, 1979 an application for conciliation was made which led to the appointment of a conciliation officer on July 9, 1979.
- (3) In early October the parties received a no board report from the Minister.
- (4) On October 11, 1979 the employer tabled an offer which is the subject of these proceedings and which is set out in detail in the Board's decision in *Wilson Automotive Belleville Ltd.*, [1980] OLRB Rep. July.
- (5) On October 18, 1979, a strike commenced. Approximately one-third of the twenty employees in the bargaining unit participated in the strike. It was a bitter conflict that lasted just short of six months.

- (6) On March 28, 1980 those employees on strike voted to accept the employer's offer of October 11, 1979 and to return to work.
- (7) On March 31, 1980 the striking employees requested to return to work in accordance with section 64 of *The Labour Relations Act*. Also on this date, the union, by registered letter, expressed its willingness to sign a collective agreement which reflected the employer's offer made October 11, 1979. On April 8, 1980 those employees who had been on strike returned to work.
- (8) Early in the month of April 1980, the union learned that the company's position had changed. Because of substantial losses suffered during the strike the employer maintained that its proposal made earlier could no longer be the basis for a collective agreement. The company then made a new demand that required the union to reimburse it for its losses sustained through the strike. It proposed that the union submit to a reduction in wages of fifty cents an hour or to the payment of a lump sum indemnity of \$100,000.00 or such other amount as a board of arbitration would determine to have been the employer's economic losses from the strike.
- (9) By its decision dated July 8, 1980 the Board found that in the circumstances the company's change of position described in subparagraph (8) above was deliberately intended to avoid making any collective agreement and was a violation of the duty to bargain in good faith.
- (10) On September 4, 1980 the parties met with a mediator. They were then faced with a draft collective agreement which was marked Exhibit 1 in these proceedings. It essentially contained the terms of the company's offer of October 11, 1979, the demand for indemnity having been dropped after the Board concluded that the demand was itself an unfair labour practice. On the contents of the offer then on the table the parties were in complete agreement.
- (11) Also on September 4, 1980 the union indicated to the employer its right under the recent amendments to the Act to have included in the collective agreement the mandatory dues checkoff clause. In response the company advised the union that it would not execute the draft collective agreement. It insisted that the union must first conduct a ratification vote among all of the employees in the bargaining unit. The union refused to do so, stating that the matter had already been voted on as of March 28, 1980. The employer then continued to refuse to execute the agreement and stated that it would request the Minister to conduct a ratification vote pursuant to the provisions of section 34e of the Act. The employer did not, moreover, undertake that it would execute the collective agreement if the vote was positive. It simply asserted that the taking of a ratification vote of the employees was a next step to which it was entitled

without any comment on what it might do as a result of either a positive or a negative vote. The positions of both the employer and the union were taken with the knowledge that the composition of the bargaining unit had changed. It is common ground that there had been some turnover of the employees since the strike began almost a year before. The turnover was the result both of normal attrition and of the strike.

- (12) On September 5, 1980 the respondent, by letter to the Minister, requested a vote on the offer made September 4, 1980. In the meantime the union signed the offer and sent it to the company for execution. It took the position that the offer being accepted by the union, as it had been by the vote of March 28, 1980, the employer could not impose further conditions upon the union's acceptance of the company's offer. The employer has refused to execute the agreement and continues to insist either that the union itself or the Minister conduct a ratification vote of all of the employees in the bargaining unit before it does anything further.

4. It is on these agreed facts that the issue is joined. The applicant argues that the respondent's behaviour amounts to one more deliberate roadblock in the way of an agreement. Its position is that an employer cannot refuse to enter into a collective agreement by requiring a vote where the union accepts the company's last offer. The union submits that section 34e of the Act was not intended to restrict its right to accept an offer made by the company.

5. The dispute between the parties goes to the scope of the duty of the employer to recognize the union as the sole bargaining agent of all of the employees in the bargaining unit and to the ability of the union to control its own acceptance of an offer from the employer. These are issues that are central to the process of bargaining under the Act. The respondent denies that it requested a vote to purposely avoid making a collective agreement. The union submits that the respondent's intention can only be to subvert the union.

6. When the union voted to accept the employer's offer of October 11, 1979, only those employees on strike took part in the vote. Other employees in the bargaining unit, namely those who were at work and had not supported the strike, did not participate in the ratification vote. The union submits that it was not necessary to canvass their views because at that time, in March of 1980, those employees had effectively accepted the monetary terms of the company's offer of October 11, 1979 in that those were the terms by which they were then being paid.

7. The employer considers that the support of the company's offer from the employees who were at work and did not back the strike is less than clear and should be tested by a vote. The employer points out that by September of 1980 the terms of its October 11th offer had been in force almost a year. The union's acceptance of those terms as the basis for a collective agreement that would last a further year would mean that employees find themselves faced with the prospect of a year without any increase in wages. While the employer submits that it is concerned that for this reason a number of the employees would not endorse the offer, its concern is apparently not deep enough to cause it to make a better offer. According to

counsel for the employer the union must submit to a vote of all of the employees; if they do not approve the offer counsel contends that the union must come back and bargain some more.

8. This complaint raises two fundamental questions. Has the respondent contravened section 14 of the Act by refusing in these circumstances to execute a collective agreement that is admittedly acceptable to both itself and the union? Can the company require that its offer be voted on by all the employees in the bargaining unit when the union itself has approved the company's offer and no provisions of the proposed collective agreement remain in dispute?

9. We consider first whether the employer has a statutory right to require a vote in these circumstances. If the employer is in fact exercising a right under the Act it could scarcely be bargaining in bad faith. Section 34e of *The Labour Relations Act* provides in part:

“(1) Before or after the commencement of a strike or lock-out, the employer of the employees in the affected bargaining unit may request that *a vote of such employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties* and the Minister shall, and in the construction industry the Minister may, on such terms as he considers necessary direct that a vote of such employees to accept or reject the offer be held and thereafter no further such request shall be made.” [emphasis added]

10. Counsel for the employer submits that the foregoing section gives the employer an absolute right to call for a ratification vote. He submits that that right obtains even where the parties have concluded bargaining and have reached agreement on the terms of the collective agreement. By his interpretation the section should not be construed as operating only when there is a conflict at the bargaining table. He reasons that since the section contemplates employees voting on an entire collective agreement, including terms that are not in dispute as between the employer and the union, it must also contemplate employees voting where all terms of a proposed contract are agreed as between the parties. As counsel for the respondent views it the purpose of section 34e is to give the employer one unqualified “look through the window” to help it in the management of its labour relations.

11. In the Board's view the intention of this section of the Act is plain. Industrial conflict is costly to employers, employees and the community as a whole. It is therefore desirable that unnecessary industrial conflict be minimized, whether it be in the form of a potential or actual strike. An employer is duty-bound to bargain exclusively with the union that has the bargaining rights for its employees. While it has a certain freedom of speech, it cannot bargain directly with its employees. It can bargain only with their union. A failure to do so is a breach of the duty to bargain in good faith. (*Radio Shack*, [1979] OLRB Rep. Dec. 1220 at 1241 - 47; *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393 at 398-99).

12. Through the bargaining process both the union and employer seek to maximize their own self interest. In doing so they frame their demands and offers in terms of their own reading of what the union membership will, in the end, accept. At some point in bargaining the company offers what it thinks the employees will accept. At that point the union may take the position that the employees require more, or that the union can obtain more for them. The result can be a stalemate which, during a strike, may be costly. Before the enactment of section

34e of the Act the union's bargaining committee might have rejected an offer from the employer that the employer was convinced would be accepted by the employees if only it could be put to them. But the employer could not require that its offer be put to a vote of the employees without the concurrence of the union. There was, in other words, no measure short of prolonged industrial conflict to resolve the stalemate that developed. Section 34e of the Act responds to that problem. It provides the supervised vote as a mechanism of public policy to move the dispute off centre.

13. A union's traditional control over when to take an offer back to the membership is a significant part of the balance of power in collective bargaining. The employer derives a certain leverage from its ability to play its cards as it chooses, making successive offers in the time and amounts that maximize its interests. The union bargaining committee has countervailing leverage in its ability to reject an offer of the employer and to insist that something better be served up before an offer is put to the employees for their acceptance.

14. Section 34e introduces a safety valve into that traditional tension in bargaining. It gives the employer the right at any time during bargaining to call for a vote of the employees on its latest offer in respect of all matters in dispute. This the employer may do once, and only once. The reason for that is obvious. It is with the union exclusively and not with the employees that the employer must bargain. To allow the employer the right to call for repeated votes of the employees would entrench substantially on the union's right to be the exclusive bargaining agent of all of the employees. In practical terms, repeated votes would work a shift in the balance of power in bargaining by eliminating the tactical leverage of the union's bargaining committee and allowing the employer to bargain directly with the employees by an ongoing referendum. By giving the employer the right to call for a vote of the employees only once, the Legislature has balanced two legitimate interests in collective bargaining. It has given the employer an instrument to identify and eliminate unnecessary industrial conflict while preserving as far as possible the fundamental interest of the union to remain the body with which the employer must bargain exclusively. The ability of the employer to reach over the trade union to the employees is, therefore, a very limited right.

15. Since the purpose of section 34e is to minimize unnecessary conflict, it is not surprising that the condition precedent to its operation is the appearance of conflict between the parties as to the terms of the collective agreement that they are in the course of bargaining. That is clear from the words of the section:

“...the employer...may request that a vote be taken as to the acceptance or rejection of the offer of the employer...*in respect of all matters remaining in dispute between the parties...*” [emphasis added]

16. In the instant case the employer has requested that a vote be taken where there are no matters remaining in dispute between the parties. The employer and the union are agreed on each and every term of the collective agreement. In these circumstances the Board must conclude that the employer is not relying on any right which it has under the Act when it grounds its refusal to sign the agreement on the fact that it awaits the taking of a vote of the employees by the Minister under section 34e of the Act. Where the union has accepted the company's offer, as it has here, the employer has no right to request a vote under the section.

17. The employer's alternative demand that the union itself conduct a ratification vote among the employees in the bargaining unit is likewise misplaced. The union has been certified as the sole bargaining agent for all employees in the bargaining unit. No employee has moved

to terminate the union's bargaining rights and no employee has brought a complaint that the union has breached its duty of fair representation. Apart from the provisions of section 34e, which we have found do not apply, there is nothing in the Act requiring a union to conduct a ratification vote of its membership. Nor is there anything prescribing the means by which a union may accept an employer's offer and bind itself to a collective agreement.

18. Under *The Labour Relations Act* an employer makes his contract with the union and not with the employees. It is common to refer to a union as a "bargaining agent". A union is, however, much more than a mere agent when it comes to negotiating and administering a collective agreement. A union has an independent legal existence which the employer is bound to respect. This critical distinction was recognized by the Supreme Court of Canada in *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 where at p. 6, Laskin C.J.C. adopted the following language of Judson J. in *Syndicat Catholique des Employés de Magasins de Québec, Inc. v. Compagnie Paquet Ltée* (1959), 18 D.L.R. (2d) 346 at 355:

The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

19. By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement. By this failure to recognize the union the employer has violated the most fundamental aspect of its duty to bargain in good faith set out in section 14 of the Act. (*De Vilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49.)

20. A careful examination of the evidence suggests that the employer's failure to recognize the union by its attempt to go directly to the employees is purposely designed to undermine the union. The employer is obviously aware of the turnover of employees that has occurred during the strike. It suspects that in all likelihood the majority of the employees, many of whom have not supported the strike, will not be pleased with the offer that has been accepted by the union. But even assuming, without finding, that that is true, it in no way changes the employer's duty to recognize the lawful status of the union as exclusive bargaining agent of all of its employees. The Act is predicated on the wishes of employees. It is framed on the basis that employees express their choice in the selection and retention of a bargaining agent through the procedures provided in the Act. As the Board has noted, in the instant case the employees have not objected to the union's conduct of its business and have not moved under the Act to extinguish the union's right to represent them. The union's bargaining rights therefore continue in full force and effect. Whatever reservations the employer may have, it is not entitled to doubt or deny those rights at the bargaining table.

21. By not making a better offer and then insisting on a ratification vote of all employees the employer would set the stage for a plebiscite calculated to undermine the union. The most plausible inference to be drawn from the employer's conduct is that it wants the vote on its offer among the employees to be vote of non-confidence in the union so overwhelming as to effectively terminate the union's bargaining ability, if not its bargaining rights. In this attempt the respondent has further breached its section 14 duty to bargain in good faith with the union and make every reasonable effort to make a collective agreement. In this regard the following comments of the Board in *Radio Shack, supra*, at 1242 are particularly apposite:

“Bargaining with the obvious view of creating and fostering dissension within a bargaining unit, is also a failure to abide by the requirements of section 14 which obligate trade unions and employers alike to “bargain in good faith and make every reasonable effort to make a collective agreement.” On numerous occasions this Board has said that the bargaining duty fortifies the employer’s obligation to recognize the duly certified bargaining agent of its employees...This means that employer conduct during the bargaining process aimed at undermining the credibility of a trade union in the eyes of the employees not only violates sections 56, 58 and 61, it will also amount to a failure to negotiate in good faith. Section 14 demands that both parties have the common intention of signing a collective agreement provided that they can reach agreement on its terms.”

22. We turn to consider the remedy appropriate in these circumstances. The misconduct of the employer in this case is the more serious in that it was previously found to have bargained in bad faith and was the subject of a declaration to that effect and of a cease and desist order by this Board as recently as two months ago.

23. The union asks the Board to order the respondent to execute the collective agreement that the union has already signed. While the Board has made such an order on one occasion in the past (*The Municipality of Casimir, Jennings and Appleby*, [1978] OLRB Rep. June 507), it is not the normal remedy in section 14 complaints. The Board’s general approach to bargaining complaints is to judge the conduct of the parties on the basis of the quality of the bargaining that has gone on between them. Insofar as possible, however, the Board avoids dealing with the content of bargaining. As a general matter the Board does not evaluate the adequacy of a particular offer nor the reasonableness of a particular demand except as it may be evidence of either a failure of the duty to recognize the other party or to engage in an acceptable standard of rational communication. In providing relief for violations of section 14 the Board generally avoids imposing a collective agreement upon an unwilling party. (See *The Journal Publishing Company of Ottawa, Limited*, [1977] OLRB Rep. June 309 at 332-33; *Radio Shack, supra* at 1264-68.) The Board’s reticence to impose a collective agreement stems from the recognition of the critical role of voluntarism in the process of collective bargaining. As a general rule the Board recognizes that the parties are best able to make their own bargain. To do otherwise would promote the use of section 14 as an avenue of interest arbitration in a way that was never intended.

24. There are, however, circumstances where the Board can order the parties to sign a collective agreement without offending the principles of voluntarism. In *The Municipality of Casimir, Jennings and Appleby, supra* the parties had arrived at “mutual agreements as to the resolution of each and every issue.” The employer, nevertheless, refused to execute the document that would become the collective agreement. Having found that the employer’s refusal was without justification and constituted a breach of section 14, the Board concluded that it could order the execution of the draft agreement without trespassing on the right of the parties to fashion their own bargain. At p. 519 it commented:

“There is no need in this case for the Board to fashion solutions for issues which are separating the parties as there are no such issues: there is no need for the Board to substitute its value judgments on particular issues for those which might be hammered out between the parties as they have all been hammered out. In addition, the imposition of a collective agree-

ment in such circumstances in the terms which have already been agreed to by the parties, is not a supplanting of the voluntary bargaining process, but rather a reaffirmation of it."

25. The same conditions obtain in this case, and the same considerations apply. The employer and the union are agreed on all matters within the collective agreement. There is nothing left to bargain. Having found that the respondent has breached the duty to bargain in good faith the Board hereby orders it to execute forthwith a copy of the draft collective agreement filed as Exhibit 1 in these proceedings.

26. The Board must consider next whether it should make some further remedial order to make the union whole from the breaches of the Act by the employer. In this case the employer delayed the making of a collective agreement for six months by bargaining in bad faith. It did so firstly between early April of 1980 and the making of the cease and desist order by the Board on July 8, 1980. Notwithstanding the Board's finding against the employer it continued to bargain in bad faith, thereby delaying the process of reaching an agreement for a further three months. Conduct so repeated and protracted can substantially weaken the union in the eyes of the employees, who may not be aware of the reasons for the time it has taken a union to get them a contract. In these circumstances the making of a collective agreement will not of itself restore a union which has been effectively estranged from the work place by the employer's conduct. On the facts of this case the Board has no doubt that the breaches of the Act by the employer have naturally weakened the union's presence in the work place and its status among the employees. We are satisfied that ordering the execution of a collective agreement will not be sufficient to restore the union to the stature it would have enjoyed among the employees but for the unlawful conduct of the respondent. The Board therefore makes a remedial order designed to give the union the opportunity to again assert its presence as bargaining agent of all of the employees in the bargaining unit.

27. The respondent is therefore directed to post copies of the attached notice marked "Appendix" after it is signed by Mr. J. Wilson, President of the respondent, in conspicuous places on its premises at Belleville, Ontario, where it will be reasonably accessible to all employees, including all places where notices to employees are customarily posted. The notice shall be posted forthwith for sixty consecutive working days and reasonable steps shall be taken by the respondent to insure that the notices are not altered, defaced or covered by any other material. Reasonable access to the respondent's premises shall be given by the respondent to two representatives of the complainant to satisfy itself that this posting requirement has been complied with.

28. The respondent is also directed, at its own expense, to mail a copy of the attached notice marked "Appendix", duly signed by J. Wilson, president of the respondent, to the residence of each employee in the bargaining unit forthwith.

29. The respondent is directed to provide the complainant with reasonable access to employee notice boards for the purpose of communicating with the employees for the period of one year from the date hereof.

30. The respondent is further directed to provide the complainant forthwith with a list of names and addresses of all bargaining unit employees and to keep the list up to date for a period of one year.

DECISION OF BOARD MEMBER F. W. MURRAY:

The decision of Board Member F. W. Murray will follow.

The Labour Relations Act

1345

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

THE ACT ALSO REQUIRES AN EMPLOYER:

TO REFRAIN FROM ANY CONDUCT WHICH INTERFERES WITH THE ORGANIZATION OR ADMINISTRATION OF A TRADE UNION;

TO RECOGNIZE A DULY CERTIFIED UNION AS HAVING THE EXCLUSIVE BARGAINING RIGHTS FOR ALL OF THE EMPLOYEES IN THE BARGAINING UNIT FOR WHICH IT IS THE CERTIFIED BARGAINING AGENT;

TO BARGAIN IN GOOD FAITH WITH THE UNION AND MAKE EVERY REASONABLE ATTEMPT TO MAKE A COLLECTIVE AGREEMENT.

WE ASSURE OUR EMPLOYEES THAT:

WE WILL EXECUTE THE COLLECTIVE AGREEMENT AS ORDERED BY THE BOARD.

WE WILL:

- 1) PROVIDE LOCAL 1979 OF THE RETAIL CLERKS INTERNATIONAL UNION REASONABLE ACCESS TO EMPLOYEE NOTICE BOARDS ON COMPANY PREMISES FOR A PERIOD OF ONE YEAR.
- 2) PROVIDE LOCAL 1979 OF THE RETAIL CLERKS UNION WITH A LIST OF NAMES AND ADDRESSES OF ALL BARGAINING UNIT EMPLOYEES AND KEEP THIS LIST UP TO DATE FOR A PERIOD OF ONE YEAR.

WILSON AUTOMOTIVE (KELLEVILLE) LIMITED

PER: J. WILSON
PRESIDENT

SEPTEMBER 30, 1960

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1980

BARGAINING AGENTS CERTIFIED DURING AUGUST

No Vote Conducted

0688-79-R: Niagara Falls Co-operative Taxi Owners Association (Applicant) v. Niagara Veteran Taxi (Respondent).

Unit: "All dependent contractors working for Niagara Veteran Taxi at Niagara Falls, Ontario." (28 employees in the unit).

1677-79-R: Ontario Nurses' Association (Applicant) v. Maitland Manor Ltd. (Respondent).

Unit #1: "All registered and graduate nurses employed in a nursing capacity by the respondent at Goderich, Ontario, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than twenty-four hours per week." (3 employees in the unit).

Unit #2: "All registered and graduate nurses regularly employed for not more than twenty-four hours per week in a nursing capacity by the respondent at Goderich, Ontario." (4 employees in the unit).

0080-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. National Dry Company Ltd. (Respondent) v. Group of Employee (Objectors).

Unit: "All employees of the respondent employed at, or working out of the company's plant at Metropolitan Toronto, save and except foremen, supervisors and persons above the rank of foreman and supervisor, and office staff." (45 employees in the unit).

0368-80-R: Labourers International Union of North America Ontario Provincial District Council (Applicant) v. K. J. Derooy Construction Limited (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in all sectors except the industrial, commercial and institutional sector in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Unit #2: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0432-80-R: Service Employees International Union, Local 183 (Applicant) v. Trent Valley Lodge Ltd. (Respondent).

Unit #1: "All employees of the respondent in Trenton, Ontario, save and except professional nursing staff, supervisors, foremen, person above the rank of supervisor or foreman, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed

during the school vacation period.” (16 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “All employees of the respondent in Trenton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, supervisors, foremen, persons above the rank of supervisor of foreman and office and clerical staff.” (9 employees in the unit). (*Having regard to the further agreement of the parties*).

0545-80-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Rice Construction Co., Limited (Respondent).

Unit #2: “All employees of the respondent regularly employed for not more than 24 hours per week engaged in cleaning and maintenance at 1180 Forestwood Drive and 1190 Forestwood Drive, Mississauga, Ontario, save and except property manager, office and clerical staff and persons employed out of the central maintenance depot. (2 employees in this unit). (*Bargaining Unit #2 — See Applications Certified Subsequent to Post-Hearing Vote*)

0611-80-R: Ontario Tax Association Local 1688 Canadian Labour Congress (Applicant) v. Blue Line Taxi Co. Limited (Respondent).

Unit: “All employees of the respondent in Ottawa, Ontario employed as dispatchers, telephone operators, and shift supervisors, save and except operations managers and persons above the rank of operations manager, persons regularly employed for not more than 24 hours/week, and students employed during the school vacation period.” (17 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

0692-80-R: Christian Labour Association of Canada (Applicant) v. Caressant Care Nursing Home of Canada Ltd. (Respondent).

Unit #1: “All employees of the respondent at Ingersoll, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, and those regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period.” (3 employees in the unit).

Unit #2: “All employees of the respondent at Ingersoll, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff.” (12 employees in the unit).

0693-80-R: Christian Labour Association of Canada (Applicant) v. Caressant Care Nursing Home of Canada Limited (Respondent).

Unit #1: “All employees of the respondent at Woodstock, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, and those regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period.” (2 employees in the unit).

Unit #2: “All employees of the respondent at Woodstock, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff.” (5 employees in the unit).

0694-80-R: Retail Clerks Union, Local 206 Chartered by the United Food and Commercial Workers International Union (Applicant) v. Davidson Funeral Homes Ltd. (Respondent).

Unit: “All employees of the respondent at Port Colborne, Welland and Fort Erie, save and except

managers, persons above the rank of manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the foregoing*).

0695-80-R: Christian Labour Association of Canada (Applicant) v. Caressant Care Nursing Home of Canada Ltd. operating under the style and cause of Caressant Care Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit #1: “All employees of the respondent at Woodstock, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, and those regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period.” (12 employees in the unit).

Unit #2: “All employees of the respondent at Woodstock, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff.” (46 employees in the unit).

0697-80-R: Commercial Workers Union, Local 486 Chartered by the United Food & Commercial Workers International Union (Applicant) v. General Bearing Service Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “All employees of the respondent in Ottawa, Ontario, save and except Manager, and persons above the rank of Manager.” (28 employees in the unit).

0699-80-R: Canadian Union of Public Employees (Applicant) v. Peel Association for Handicapped Adults (P.A.H.A.) operating as Peel Handi-Care (Respondent).

Unit: “All part-time employees of the respondent in the Regional Municipality of Peel, save and except supervisors and persons above the rank of supervisor.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

0716-80-R: Service Employees Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Mini-Skools Ltd. (Respondent).

Unit: “All employees of the respondent at 178 Church St. E., Brampton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisors, office staff and persons covered by a subsisting collective agreement between the respondent and Service Employees Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

0721-80-R: International Union of Electrical, Radio and Machine Workers (Applicant) v. Regional Home Appliance Service Limited (Respondent).

Unit: “All employees of the respondent in the City of Ottawa, save and except assistant parts manager, persons above the rank of assistant parts manager, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (23 employees in the unit). (*Clarity note*)

0744-80-R: International Beverage Dispensers’ and Bartenders’ Union Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. Beersden Hotels Limited (Respondent).

Unit: “All full-time and part-time and male and female bartenders and tapmen, barboys, improver, waiters, beerex operators in the employment of the respondent at the Brunswick Tavern in Toronto.” (15 employees in the unit).

0759-80-R: United Food and Commercial Workers International Union (Applicant) v. Sherwood Farms, Division of Robin Hood Multifoods Limited (Respondent).

Unit: "All office employees of the respondent in the city of Niagara Falls, save and except Plant Manager, Plant Superintendent, Maintenance Foreman, Receiving Room Foreman, Shipper, and plant employees covered by an existing collective agreement." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0765-80-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "All waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the Respondent at 288 Bath Road, in the City of Kingston, save and except hostesses and persons above the rank of hostess." (51 employees in the unit). (*Having regard to the agreement of the parties*).

0773-80-R: Service Employees Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.I.C. (Applicant) v. Runnymede Hospital (Respondent).

Unit: "All Registered and Graduate nurses employed by Runnymede Hospital in Metropolitan Toronto who are engaged in a nursing capacity, save and except the assistant head nurses, head nurses, Supervisors, persons above the rank of assistant head nurse, head nurse or supervisor, and persons regularly employed for not more than twenty-four hours per week, and persons covered by subsisting Collective Agreement." (14 employees in the unit). (*Having regard to the agreement of the parties*).

0782-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Humane Society Division 028, Keswick, Ontario (Respondent) v. C.U.P.E. Local 1323 (Intervener).

Unit: "All employees of the respondent employed at Keswick, Ontario, in the Township of Georgina, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (6 employees in the unit).

0785-80-R: International Association of Machinists and Aerospace Workers District Lodge 717 (Applicant) v. Koppers Engineered Products Limited Power Transmission Division (Respondent).

Unit: "All employees of the respondent in the Borough of Etobicoke, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in the unit). (*Having regard to the agreement of the parties*).

0788-80-R: Ontario Nurses' Association (Applicant) v. The Wellesley Hospital (Respondent).

Unit: "All Registered and Graduate nurses regularly employed for not more than twenty-four hours per week in a nursing capacity by The Wellesley Hospital in Toronto, save and except head nurses and those above the rank of head nurse." (158 employees in the unit). (*Having regard to the agreement of the parties*).

0794-80-R: Ontario Public Service Employees Union (Applicant) v. Woodstock Ambulance Limited (Respondent).

Unit: "All employees of the respondent in or out of the County of Oxford, Ontario, save and except owner operator, office manager and supervisor/acting assistant manager." (16 employees in the unit). (*Having regard to the agreement of the parties*).

0809-80-R: Ontario Public Service Employees Union (Applicant) v. Mini Skool Limited (Respondent).

Unit #1: "All employees of the respondent at 22 Tuxedo Court in Scarborough, Ontario, save and except assistant supervisors, persons above the rank of assistant supervisor, office and sales staff, persons

regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “All employees of the respondent at 22 Tuxedo Court in Scarborough, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant supervisors, persons above the rank of assistant supervisor, office and sales staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0820-80-R: International Brotherhood of Painters and Allied Trades — Local Union 1891 (Applicant) v. Omni Drywall (Respondent).

Unit #1: “All painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Clarity note*)

Unit #2: “All painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Clarity note*).

0824-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America (Applicant) v. Inter City Papers Limited (Respondent).

Unit: “All employees of the respondent working at 189 Adelaide Street South, London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

0825-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. General Supply, A Division of Kesmark Ltd. (Respondent).

Unit: “All employees of the respondent working in and out of the equipment yard and repair shop at 5280 Dixie Road, Mississauga, save and except non-working foremen, persons above the rank of non-working foreman, watchmen, security guards, office, clerical and sales staff.” (23 employees in the unit). (*Having regard to the submissions and partial agreement of the parties*). (*Clarity note*).

0839-80-R: Canadian Paperworkers Union (Applicant) v. The Williamhouse (Ontario) Limited (Respondent).

Unit: “All employees of the respondent at Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (33 employees in the unit). (*Having regard to the agreement of the parties*).

0849-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Taggart Construction Limited (Respondent).

Unit: “All employees of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands sought thereof in the United Counties of Leeds and Grenville, excluding the industrial,

commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foreman and persons above the rank of non-working foreman." (5 employees in the unit).

0851-80-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 and The Ironworkers District Council of Ontario (Applicant) v. Clow Darling Plumbing & Heating Co. Limited (Respondent).

Unit #1: "All ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

Unit #2: "All ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

0852-80-R: Ontario Nurses' Association (Applicant) v. Northumberland County (Golden Plough Lodge) Respondent.

Unit #1: "All registered and graduate nurses employed in a nursing capacity by the respondent at its Golden Plough Lodge in the County of Northumberland, save and except Director of Nursing Services, persons above the rank of Director of Nursing Services, persons regularly employed for not more than 24 hours per week." (4 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "All registered and graduate nurses employed in a nursing capacity by the respondent at its Golden Plough Lodge in the County of Northumberland, who are regularly employed for not more than 24 hours per week, save and except Director of Nursing Services and persons above the rank of Director of Nursing Services." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0856-80-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Fibre Therm Corp. (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (25 employees in the unit). (*Having regard to the agreement of the parties*).

0869-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 301 (Respondent).

Unit: "All employees of the respondent employed at 10 Parkway Forest Drive, Don Mills, Ontario, save and except property manager, persons above the rank of property manager, office and clerical staff." (4 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

0879-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Anton Kikas Limited (Respondent).

Unit: "All field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, persons above the rank of party chief, draftsmen, sales, office and clerical staff, and students." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0886-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America (Applicant) v. Brink's Canada Limited (Respondent).

Unit: "All employees of the respondent at Cornwall, Ontario, save and except dispatchers, foremen, persons above the ranks of dispatcher and foreman, clerical and sales staff, and persons regularly employed for not more than twenty-four hours per week." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0887-80-R: Hotel & Restaurant Employees Union Local 756 (Applicant) v. Dutch Treat Restaurant & Deli Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent at 12 James St. S., Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the summer school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*).

0904-80-R: United Steelworkers of America (Applicant) v. The Wind Turbine Company of Canada Limited (Respondent).

Unit: "All employees of the respondent company in Elmira, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (25 employees in the unit).

0932-80-R: International Brotherhood of Electrical Workers, Local 594 (Applicant) v. J. S. H. Mueller Limited (Respondent).

Unit #1: "All electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Unit #2: "All electricians and electricians' apprentices in the employ of the respondent in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0944-80-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1425; 1592; 1669; 1916 and 2309 (Applicant) v. S. Meehan Millwright Services (Respondent).

Unit #1: "All millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwrights and millwrights' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Toronto, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Unit #2: "all millwrights and millwrights' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0946-80-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Timbermen Installations (Respondent).

Unit #1: "All carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Unit #2: "All carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0986-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. E & E Seegmiller Ltd. (Respondent).

Unit: "All employees of the respondent within a twenty mile radius of the North Bay post office, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (17 employees in the unit).

0987-80-R: Labourers' International Union of North America — Local 183 (Applicant) v. Dellbrook Construction Inc. (Respondent).

Unit: "All construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Townships of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Certifications Certified Subsequent to Pre-Hearing Vote

0738-80-R: Graphic Arts International Union Local 12-L Toronto, Ontario (Applicant) v. Southam Murray Printing, a Division of Southam Printing Limited (Respondent) v. Toronto Printing Pressmen and Assistants' Union Local 10 Subordinate to the International Printing and Graphic Communications Union (Intervener).

Unit: "All skilled maintenance employees of the respondent in Metropolitan Toronto and their helpers (those employed to directly assist the skilled maintenance employees) including but not limited to carpenters, machinists, electricians, plumbers and cabinet-makers, save and except engineering students, foremen and those above the rank of foreman, and those employees covered by other subsisting collective agreements with the respondent." (27 employees in this unit). (*Clarity note*).

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	27
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	

0748-80-R: International Union of Operating Engineers Local 796 (Applicant) v. Bramalea Limited (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener).

Unit: "All employees of the respondent employed at No. 1 Yonge Street, Toronto, Ontario, save and except foremen, assistant superintendent, persons above the rank of foreman and assistant superintendent, office and sales staff, security officers, and persons regularly employed for not more than twenty-four (24) hours per week." (10 employees in this unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	12	
Number of ballots marked in favour of the applicant	9	
Number of ballots marked in favour of the intervener	3	

Applications Certified Subsequent to Post-Hearing Vote

0388-80-R: Hotel and Restaurant Employees Union, Local 743, affiliated with the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. 355621 Ontario Limited c.o.b. Dairy Queen (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent at Windsor, Ontario, save and except assistant manager, persons above the rank of assistant manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in this unit). (*Clarity note*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	8	
Number of ballots marked in favour of the applicant	5	
Number of ballots marked against the applicant	3	

0393-80-R: International Union of Operating Engineers Local 796 (Applicant) v. Sanibec Corporation (Respondent).

Unit: "All employees of the respondent engaged in cleaning services at Montfort Hospital Ottawa, save and except foremen and foreladies, persons above the rank of foremen and foreladies, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons covered by subsisting collective agreement." (26 employees in this unit).

Number of names on revised voters' list		25
Number of persons who cast ballots	25	
Number of ballots marked in favour of the applicant	20	
Number of ballots marked against the applicant	5	

0545-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Rice Construction Co., Limited (Respondent).

Unit #1: "All employees of the respondent engaged in cleaning and maintenance at 1180 Forestwood Drive and 1190 Forestwood Drive, Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and persons employed out of the central maintenance depot. (4 employees in this unit). (*Bargaining Unit #2 — See Applications for Certification — No Vote Conducted*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of spoiled ballots	1	
Number of ballots marked in favour of the applicant	3	
Number of ballots marked against the applicant	0	

0700-80-R: The Canadian Union of Public Employees (Applicant) v. Sunshine Nursing Home (Respondent).

Unit: "All employees of the respondent in Hamilton, Ontario, save and except supervisor, those above the rank of supervisor, office staff, employees working not more than twenty-four hours per week and students employed during the summer vacation." (18 employees in this unit).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	17	
Number of ballots marked in favour of the applicant	11	
Number of ballots marked against applicant	6	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0518-80-R: United Paperworkers International Union (Applicant) v. Kimberly-Clark of Canada Limited Pulp and Forest Products Division (Respondent) v. Group of Employees (Objectors).

Unit: "Salaried employees of the mill departments engaged in office work while employed in the offices located in the company premises at Terrance Bay, Ontario." (208 employees in the unit).

0834-80-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Timbermen Installations (Respondent).

0898-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. MCA Canada Ltd. (Respondent).

0926-80-R: The Canadian Union of Public Employees (Applicant) v. St. Patrick's Home of Ottawa (Respondent) v. Group of Employees (Objectors).

Certification Dismissed Subsequent to Pre-Hearing Vote

0677-80-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Canadian Gypsum Company, Limited (Respondent).

Unit: "All employees of the respondent at its roofing plant at 560 Commissioners Street in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, research, sales, office and clerical staff, those regularly employed for not more than 24 hours per week and students employed for the school vacation period." (73 employees in the unit).

Number of names of persons on revised voters' list		78
Number of persons who cast ballots	78	
Number of ballots marked in favour of applicant	37	
Number of ballots marked against the applicant	39	
Ballots segregated and not counted	2	

Certification Dismissed Subsequent to Post-Hearing Vote

0310-80-R: The Canadian Union of Public Employees (Applicant v. Prescott-Russell Association for the Mentally retarded (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent in the United Counties of Prescott and Russell, save and except Managers, those above the ranks of Manager, Secretary to the Executive Director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (38 employees in the unit).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots	41	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	19	
Number of ballots marked against the applicant	19	
Ballots segregated and not counted	2	

0426-80-R: Retail Clerks Union, Local 206, (Chartered by the United Food and Commercial Workers International Union) (Applicant) v. Canadian Funeral Management Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent in Burlington, Ontario, save and except managers, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (22 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against the applicant	3	

0560-80-R: Canadian Union of Public Employees (Applicant) v. Charterways Transportation Limited (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent working at and out of Sudbury, Ontario, save and except dispatcher, persons above the rank of dispatcher, Secretary to the Branch Manager and persons covered by the certificate issued under Board file 1596-79-R January 8th, 1980." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against the applicant	3	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0659-80-R: Ontario Taxi Association Local 1688 Canadian Labour Congress (Applicant) v. Blue Line Taxi Co. Limited (Respondent). (11 employees).

0672-80-R: Labourer's International Union of North America — Local 183 (Applicant) v. Gendrain Construction Limited (Respondent). (5 employees).

0781-80-R: United Brotherhood of Carpenters and Joiners of America (Applicant) and Terry Leroux, Terry Leroux — Steel Building — Welding — Sheet metal, Terry Leroux Construction Ltd. (Respondent). (4 employees).

0837-80-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. Ault Foods Limited (Respondent). (4 employees).

0845-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Party Beverages Limited (Respondent). (4 employees).

0930-80-R: Ontario Public Service Employees Union (Applicant v. St. Joseph's Hospital, Hamilton, Ontario (Respondent) v. Canadian Union of Public employees and its Local 786 (Intervener). (62 employees).

0931-80-R: The Ontario Provincial Council of Carpenters, United Brotherhood of Carpenters and Joiners of America on behalf of all its affiliated bargaining agents (Applicant) v. Tippet-Richardson (Ottawa) Ltd. (Respondent). (2 employees).

0988-80-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Kalar Road Residence (Respondent). (3 employees).

0994-80-R: Canadian Merchant Service Guild (Applicant) v. Royal Hydrofoil Cruises (Canada) Limited (Respondent). (4 employees).

APPLICATION UNDER SECTION 1(4)

1818-79-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L. - C.I.O. - C.L.C. and its Local P287 (Applicant) v. Beef Terminal (1979) Limited (Respondent) v. Beef Terminal Owned & Operated by Sterling Packers & Town Packers, (Intervener). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2300-79-R: John Rivard (Applicant) v. Retail, Wholesale and Department Store Union, Local 545 — AFL:CIO:CLC (Respondent) v. Michaud and Levesque Limited (Intervener). (*Granted*).

2395-79-R: Sharon Steel (Applicant) v. Hotel and Restaurant Employee's Union, Local 756 (Respondent) v. Welland Hotel (Thorold) Limited (Intervener). (*Dismissed*).

2477-79-R: Roland Brideau (Applicant) v. The Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America (Respondent). (*Granted*).

0213-80-R: David Lennarduzzi (Applicant) v. Operative Plasterers' and Cement Masons International Association of United States and Canada, Local 345 and Ontario Provincial Conference of the Operative Plasterers' and Cement Masons International Association of United States and Canada and Operative Plasterers' and Cement Masons International Association of United States and Canada (Respondents). (*Granted*).

0215-80-R: Roger Laliberte (Applicant) v. Operative Plasterers' and Cement Masons International Association of United States and Canada, Local 345 and Ontario Provincial Conference of the Operative Plasterers' and Cement Masons International Association of United States and Canada and Operative Plasterers' and Cement Masons International Association of United States and Canada (Respondents). (*Granted*).

0280-80-R: A. Kontrimas, Charles R. Nunamaker (Applicant) v. Christian Labour Association of Canada (Respondent). (*Granted*).

0380-80-R: Orvel Linington (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent). (*Granted*).

0398-80-R: Tom Hodgins — Representing the majority of the members of C.C.W. Union, Local 69, Office Unit (Applicant) v. Canadian Chemical Workers Union (Respondents). (*Granted*).

0486-80-R: Linda Robinson (Applicant) v. United Food and Commercial Workers International Union Local 175 (Respondent) v. Dunnville Supermarkets Ltd. (Intervener). (*Granted*).

0551-80-R: Joel Carreiro (Applicant) v. United Steelworkers of America (Respondent) v. Dresser Industries Canada Ltd., Industrial Products Division, Mississauga Service Centre (Employer). (*Granted*).

0743-80-R: Clarence Hynes (Applicant) v. International Association of Machinists and Aerospace Workers, Local 788 (Respondent). (*Dismissed*).

0779-80-R: Joyce Stinsman (Applicant) v. Canadian Food and Allied Workers Local Union 175, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, representing the part-time employees of Dunnville Supermarkets Limited (Respondent) v. Dunnville Supermarkets Limited (Intervener). (*Dismissed*).

0870-80-R: Master Mailers Ltd. (Applicant) v. Office & Professional Employees International Union (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 54

0636-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Pepsi-Cola Bottling Company of Ottawa (Pepsi-Cola Canada Ltd.) (Respondent). (*Granted*).

0664-80-R: Ontario Public Service Employees Union (Applicant) v. Unemployment Help Centre (Respondent). (*Granted*).

0665-80-R: Ontario Public Service Employees Union (Applicant) v. Riverside Socio-Legal Services (Respondent). (*Granted*).

0666-80-R: Ontario Public Service Employees Union (Applicant) v. Toronto Community of Legal Assistance Service (Respondent). (*Granted*).

0667-80-R: Ontario Public Service Employees Union (Applicant) v. Parkdale Community Legal Services (Respondent). (*Granted*).

0668-80-R: Ontario Public Service Employees Union (Applicant) v. Metro Tenants Legal Services (Respondent). (*Granted*).

0669-80-R: Ontario Public Service Employees Union (Applicant) v. Mississauga Community Legal Services (Respondent). (*Granted*).

0670-80-R: Ontario Public Service Employees Union (Applicant) v. Injured Workers' Consultants (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0866-80-U: Mechanical Contractor's Association and H. G. Francis & Sons Limited (Applicant) v. United Association of Plumbers and Fitters Union Local 71; Gerald Gowan, Joseph Jasiak, Jeff Davidson, John Adams (Respondents). (*Withdrawn*).

0899-80-U: Windsor Airline Limousine Services Limited, c.o.b. as Veteran Cab Company (Applicant) v. Ontario Taxi Assoc. 1688, C.L.C., John Garrie, Jack McDowell, et al (Respondents). (*Withdrawn*).

0977-80-U: Canadian Union of Public Employees (Applicant) v. The Administrative and Technical Staff Union — Unit "B" and J. E. (Ed.) McAllister, Shireen Hill, Linda LeGroulx, Breda Murphy, David Laventure, Ralph Maille, Shereen Bowditch, Camille G. Masse and Margaret McAllister (Respondents). (*Granted*).

APPLICATION FOR DECLARATION THAT LOCKOUT UNLAWFUL

0980-80-U: The Ontario Nurses' Association, Local 193 (Applicant) v. Hawkesbury and District General Hospital Inc. (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1935-79-U: Ontario Taxi Association 1688, Canadian Labour Congress (Applicant) v. Stewart Caverhill, Stan Heaney, and Windsor Airline Limousine Service Ltd. Veteran Taxi Co. (Subsidiary) (Respondents). (*Withdrawn*).

0097-80-U: Larry L. Pitts, Plant Chairman of Burroughs Unit Local 303 of U.A.W. (Applicant) v. Mr. Joe Buttigieg and Mr. Keith Ball of Burroughs Business Machine Supply Division (Respondents). (*Withdrawn*).

0540-80-U: International Union of Operating Engineers, Local 793 (Applicant) v. Donald A. Foley Limited and Maceron Limited and 429185 Ontario Limited Carrying on Business as Kingston Aggregates (Respondents). (*Dismissed*).

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0172-80-R Joseph Foley, Applicant, v. International Brotherhood of Painters and Allied Trades, International Brotherhood of Painters and Allied Trades Local 200, The Ontario Council of the International Brotherhood of Painters and Allied Trades, Respondents, v. A.N. Shaw & Sons (Eastern) Ltd., Intervener.

Construction Industry – Petition – Termination – Working foreman originating and circulating petition among crew

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Paul A. Niebergall for the applicant; S. B. D. Wahl, R. Tier and A. Colafranceschi for International Brotherhood of Painters and Allied Trades Local 200 and The Ontario Council of the International Brotherhood of Painters and Allied Trades; W. G. Phelps, P. M. Rusak and Peter Hart for the intervener.*

DECISION OF VICE-CHAIRMAN IAN C. A. SPRINGATE AND BOARD MEMBER H. J. F. ADE; October 23, 1980

1. This is an application under section 49 of *The Labour Relations Act* for a declaration terminating bargaining rights.
2. The application as filed named only the International Brotherhood of Painters and Allied Trades as a respondent. However, reference was made in the application to Local 200 of the same union and the statement of desire filed in support of the application contained the statement that Local 200 was the relevant bargaining agent. On the first day of hearing, counsel appeared on behalf of Local 200 and took the position that the bargaining rights in issue were in fact held by The Ontario Council of the International Brotherhood of Painters and Allied Trades (to which Local 200 and other Ontario locals of the International are affiliated) and that he did not represent the Ontario Council. Counsel for the applicant then requested that the Ontario Council and Local 200 be formally added as respondents to the proceedings, and the Board acceded to this request. The matter was then set down for hearing at a later date. When the matter came back on for hearing the same counsel attended on behalf of Local 200 and indicated that he was now also representing the Ontario Council and all of its affiliated locals.
3. On a review of the material before us, we are satisfied that bargaining rights for the intervener's employees were originally acquired by Local 200, although subsequently negotiations were conducted and collective agreements entered into by the Ontario Council on behalf of Local 200. We are further satisfied that Local 200 still retains its bargaining rights, although these are now bargained for by a designated employee bargaining agency comprised of the International Union and the Ontario Council. As a result of the enactment of section 125(2) of the Act it would appear that although the intervener currently operates only within the geographic jurisdiction of Local 200, insofar as the industrial, commercial and institutional sector of the construction industry is concerned, it is deemed to have recognized as bargaining agents for its employees other Ontario locals of the International in their respective geographic jurisdictions. As already indicated, counsel who attended at the hearing dealing

with the merits of the application indicated that he was representing all of the locals affiliated with the Ontario Council.

4. This application was originally filed on April 25, 1980, at a time when it was clearly timely. Local 200 and the Ontario Council were formally added as parties to the proceeding at the first day of hearing on May 30, 1980. Counsel for the respondents was of the view that the Board should treat May 30th as the date of the making of the application. It was his further contention that on May 30, 1980 the application would have been untimely. We are satisfied that April 25, 1980, the actual date of filing, should be the date used by the Board as the application date. We do not believe that any undue prejudice would result to the respondents from doing so, but that the applicant might suffer real prejudice if the Board were to take any other approach.

5. It was the contention of counsel for Local 200 that on April 25, 1980 there were no employees of the intervener employed in the bargaining unit. It is not disputed that two employees of the respondent, including Mr. Foley, the applicant, were at work on the relevant date. It is also not disputed that at the time both of them were members of Local 200 and were being paid pursuant to the provisions of the applicable provincial collective agreement. Nevertheless, it was the contention of counsel for the Union that the work these two employees were engaged in did not come within the "Scope of Work" clause of the collective agreement. On the evidence before us, however, we are satisfied that on April 25th the two employees in question were engaged in caulking work, which is a type of work encompassed by the scope of work clause in the collective agreement. Accordingly, we are satisfied that on the application date there were at least two employees at work in the bargaining unit.

6. The intervener filed a list indicating that it had seven employees in the bargaining unit. Two of these were the individuals referred to above who were actually at work on April 25th. All of the persons on the list, with the exception of Mr. Foley, the applicant, signed a statement of desire in opposition to continued representation by the respondent. For his part, Mr. Foley signed the application form requesting that the respondent's bargaining rights be terminated. On the basis of this material, we are satisfied that all of the employees in the bargaining unit on the application date (whether the proper number be two or seven) had indicated that they no longer desired to be represented by the union.

7. This then brings us to the issue of whether the statement of desire can be accepted as a voluntary signification of those who signed it. The Board is always concerned that employees may have signed such a statement of desire out of the belief that it had the support of management and that management might become aware of any refusal on their part to sign it. It is worth noting at the outset that we are fully satisfied that there was no actual managerial involvement in either the preparation or circulation of the statement of desire. Notwithstanding the lack of any evidence indicating actual management involvement, counsel for the union contended that employees would likely have perceived that management was involved with the statement of desire because of the leading role played by Mr. Foley in its origination and circulation and the fact that Mr. Foley is employed as a working foreman.

8. Mr. Foley is a member of Local 200 who is paid an hourly rate pursuant to the terms of the collective agreement. He is regarded as a bargaining unit employee and does not exercise any managerial functions. However, as a working foreman, Mr. Foley does perform certain supervisory functions. He is responsible for assigning work to employees in his crew and also

for pointing out to them any errors which they may have made. Mr. Foley makes reports to management on the work performance of other employees. Mr. Foley does not become directly involved in discussions relating to the hiring and firing of employees. However, it is reasonable to assume that his reports concerning employee work performance are taken into account by management when it considers its staffing requirements.

9. Mr. Foley and another employee, Mr. J. Shipperbottom, were the ones who originally decided to seek to terminate the union's bargaining rights. Although they first met as employees of the intervener, Mr. Foley and Mr. Shipperbottom are personal friends outside of the work place. According to Mr. Foley, the reason for the decision to seek to terminate the union's bargaining rights was the feeling that union representation acted to restrict the work opportunities available to the intervener's employees. Mr. Foley made particular reference to a job at Eaton's Bayshore in Ottawa. According to Mr. Foley, he and the intervener's other employees had been working at this job for some period of time when they were laid off for five to six weeks while employees of another firm were brought in to perform some sheet metal work. Mr. Foley indicated that he felt that he and the intervener's other employees could have performed this work themselves, and that to his mind the reason they were not asked to do so was because the work was not covered by their collective agreement. Mr. Foley testified that after he and Mr. Shipperbottom decided to seek to terminate the respondent's bargaining rights, they discussed the matter with the other employees and then retained the services of a lawyer who had recently acted on Mr. Shipperbottom's behalf in a real estate transaction. The lawyer prepared the statement of desire, which was later signed by the employees in the presence of both Mr. Foley and the lawyer.

10. In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.

11. Employees would have been well aware of Mr. Foley's supervisory role, particularly in assigning work. They would also likely have been aware of the fact that he was responsible for making reports to management concerning their work performance. It is also reasonable to assume that the other employees would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union member within the bargaining unit. The evidence does not suggest that Mr. Foley did anything to indicate to the employees that he was acting of behalf of management. To the contrary, his case in favour of terminating the respondent's bargaining rights was based upon his view that union representation had acted to restrict the work available to himself and others. Along with the other employees he had been laid off for five or six weeks under circumstances where he felt he need not have been, and he blamed the existence of the collective agreement for this fact. When all of these considerations are taken into account, we feel that the other employees would more likely have regarded Mr. Foley as acting in what he perceived to be in his own interests rather than acting on behalf of management.

12. Before leaving this matter, we would note that this case differs in certain key respects from certification cases involving anti-union petitions. Here there has been no sudden and apparently inexplicable change of heart relating to union support on the part of employees who only a short time before had become union members. Further, the employees here have been represented by the union for some period of time and presumably they would have been aware of the union's ability to protect employees from being discriminated against for continuing to support the union.

13. When all these considerations are taken into account, we are satisfied on the balance of probabilities that not less than forty-five per cent of the employees of A. N. Shaw and Sons (Eastern) Ltd. in the bargaining unit, at the time and application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union as of May 14, 1980, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

14. A representation vote will be taken amongst the employees of A. N. Shaw and Sons (Eastern) Ltd. Those eligible to vote are all employees of the intervener covered by the collective agreement between the Ontario Painting Contractors Association, Acoustical Association of Ontario, The Interior Systems Contractors Association - and - The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades on the date hereof who do not voluntarily terminate their employment or who are discharged for cause on the date thereof and the date the vote is taken.

15. Voters will be asked to indicate whether or not they wish to be represented by Local 200 or any other local of the International Brotherhood of Painters and Allied Trades in their employment relations with A. N. Shaw and Sons (Eastern) Ltd.

16. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER C. A. BALLENTINE:

1. I dissent in this case on the grounds that the voluntariness of the statement of desire is suspect and I am not satisfied that it represents the true wishes of the employees who signed it.

2. The petition was initiated and circulated by the company's construction foreman Joseph Foley, the only "on-site" foreman.

3. As the majority states in paragraph 8, Mr. Foley performs "certain supervisory functions. He is responsible for assigning work to employees in his crew and also for pointing out to them any errors which they may have made. Mr. Foley makes reports to management on the work performance of other employees". I agree with the majority finding that "it is reasonable to assume that they [the employees] would also have been aware of the fact that he was responsible for making reports to management concerning their work performance". Mr. Foley admitted as much on cross-examination:

Question: On the job site in the field are you the boss of the crew?

Answer: Yes.

Question: Is everyone aware of that?

Answer: Yes.

Question: Who tells Mr. Blaine, the supervisor, if a particular man could or couldn't do the work?

Answer: I would — but I wouldn't do any hiring or firing though.

Frankly, it is difficult to accept Mr. Foley's volunteered evidence that he does not hire and fire as that is a general practice of a foreman in the construction industry.

4. Although I accept the above-quoted findings of the majority I take issue with paragraph 11 in which they assume how the employees would perceive Mr. Foley's status as a working foreman. According to the majority, the employees,

“would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union member within the bargaining unit.”

From my experience in the construction industry, this statement does not accurately represent the status of a foreman in the construction industry. The foreman represents management's interests – his main responsibility is to produce. It is an accepted fact, and a tradition, that while a fellow tradesman is acting in the capacity of a foreman, he is representing the company and not the union. In the construction industry a foreman, such as Mr. Foley, commands far more authority than a “lead hand”, or even a foreman, in a manufacturing plant. In the manufacturing setting there is a higher chain of management constantly on the premises. The presence of these upper-level management persons could decrease the apparent authority of the “lead hand” or foreman in the eyes of his fellow workers. Conversely, on a construction site the foreman could be the only management person that a tradesman may come in contact with. This is so because the construction industry is a transient industry where many of the workers depend on the hiring hall process for their employment.

5. Where the Board is uncertain as to the voluntariness of the petition there will remain “legitimate doubts concerning the reliability of the document as an expression of the true wishes of the employees” which must cause the petition to be dismissed. (See *Leamington Vegetable Growers' Co-operative Limited*, [1974] OLRB Rep. June 402.)

6. The critical issue is whether the petition was signed voluntarily by the employees concerned. The test for voluntariness in such circumstances was set down by the Board in *Kilgoran Hotels Ltd. c.o.b. as Ye Olde Brunswick Tavern*, [1975] OLRB Rep. Mar. 240 at para. 10:

“The essential factors weighed by the Board are the concerns of employees who have been approached to sign the petition in relation to

the potential threat of their job security should they refuse to accede to the request.”

7. I am satisfied that had this been a certification application the petition would have been set aside. It is obvious the majority has differentiated between certification and termination applications, see paragraph 12 of the majority decision. While this Board is less likely to find that a petition is involuntary in a termination case than in a certification case because there has been no sudden and inexplicable change of heart that makes the expression of non-support suspicious, (see *N.J. Spivak Ltd.*, [1977] OLRB Rep. July 462 and *Northern Telecom Canada Ltd.*, [1979] OLRB Rep. Apr. 330.) I feel that the same standard must be applied in determining the voluntariness of a petition whether it is in support of a termination application or in opposition to a certification application. There is a line of cases relating to the circulation of a petition by a person in a supervisory capacity being set aside by the Board. (See *General Industries Limited*, [1974] OLRB Rep. Oct. 662; *Atlantic & Pacific Tea Company Limited*, [1969] OLRB Rep. Nov. 948; *Becker Milk Company Limited*, [1966] OLRB Rep. April 37 and *Leamington Vegetable Growers' Co-operative Limited*, *supra*.) The absence of a sudden change of heart is only one consideration in the determination of voluntariness. What must also be weighed is the extent of actual or apparent supervisory authority exercised by the originator of the petition. *Where the extent of supervisory authority held by the originator of the petition is so significant as to make it reasonable for an employee to perceive a potential threat to his job security should he refuse to sign, then the petition should be found to be involuntary.*

8. In this case it was found that Mr. Foley, the originator of the petition, exercised considerable managerial authority including the assignment of work; the assessment of work performance; and the overall day-to-day supervision of the site. Mr. Foley was perceived by his fellow workers as “the boss”. In these circumstances I find that it would have been reasonable for an employee to perceive a potential threat to his job security if he had refused to sign. Therefore, I find the petition to be involuntary and not representative of the true wishes of the employees concerned.

9. For these reasons, I would dismiss the application.

2271-79-R The Ironworkers' District Council of Ontario, and The International Association of Bridge, Structural and Ornamental Ironworkers, Local Unions, 700, 721, 736, 759, 765 and 786, Applicant, v. William A Squire, Roy Squire and William Munro, carrying on business as **Brant Erecting and Hoisting**, Beverley Munro, carrying on business as Provincial Steel and Beverley Munro Inc., carrying on business as Provincial Steel, Respondent.

Related Employer – Three partners establishing business – Partnership dissolved – New company established for principal partner to carry on business – Declaration issuing (Dissent of Board Member C. G. Bourne – Majority decision reported [1980] OLRB Rep. July 945)

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members C. A. Ballentine and C. G. Bourne.

DECISION OF BOARD MEMBER C. G. BOURNE; October 9, 1980

1. I must, with respect, dissent from the majority decision in this case.
 2. In my view, section 1(4) was not framed with the circumstances of the present case in mind. It refers to "associated or related activities. . . carried on. . . by or through more than one corporation. . . under common control or direction. . ." (the plural case seems deliberate and should be noted). It seems, then, that the section was written to deal with companies or enterprises which are brought into being, or dissolved, to meet the exigencies of construction work, whose volatility is a common – and indeed, necessary – characteristic of the industry.
 3. These features are entirely absent in the present case. Munro and his partners went out of business because of an unfortunate venture in Windsor. Their relationship was terminated, the partnership wound up and the assets dissipated. Munro, now alone and unable to start up in business on his own because of his indebtedness, established a new business with his wife as sole owner, and himself as manager.
 4. Munro is the sole link with the previous company. There are none of the usual concomitants which bear on a sale, a transfer or resumption of a business. Neither was it a device to evade his legal commitments and responsibilities. He brought nothing from the previous company – no assets to speak of, no logo, no customer lists, no goodwill – nothing, in fact, but himself so that he could continue to make a living alone and independently. It was not done to avoid or subvert a union, nor to metamorphize an old company in a new disguise.
 5. Section 1(4) allows latitude to the Board in considering cases of this sort, no doubt so as to make the distinctions that are called for here. Accordingly, I would dismiss the grievance.
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0188-80-R Labourers' International Union of North America, Local 645, Applicant, v. **Bravo Cement Contracting Ltd.**, Respondent, v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 345, Incumbent trade union.

Pre-Hearing Vote – Applicant requesting pre-hearing vote – Naming another union as interested party – Applicant losing vote – Seeking to set aside pre-hearing application – No objections made prior to counting – Effect of waiver considered

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members H. J. F. Ade and H. Simon.

APPEARANCES: *S. B. D. Wahl, G. Morga and O. D'Agostini for the applicant; No one appearing for the respondent; L. C. Arnold and G. Dacanzin for the incumbent trade union.*

DECISION OF THE BOARD; October 6, 1980

1. This is an application for certification in which the parties have raised a number of issues on which they seek either a Board determination, or directions as to the appropriate manner of proceeding. In order to understand the matters which have been raised, it is necessary to review the course of proceedings to date.

I

2. The application for certification was made on April 25, 1980 and was one of a series of similar applications involving an attempt by the Labourer's union to replace Local 345 of the Plasterers' union, as the bargaining agent for the employees of various construction contractors in the Windsor area. In its application, the applicant listed the Plasterers' union as a "trade union known to the applicant as claiming to be the bargaining agent of, or as claiming to represent any of the employees who may be affected." The applicant also requested the taking of a pre-hearing representation vote. Section 8 of the Act respecting pre-hearing votes reads as follows:

"1. Upon an application for certification the trade union may request that a pre-hearing representation vote be taken.

2. Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

3. The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection 2 shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

4. After a representation vote has been taken under subsection 2, the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection 2 has the same effect as a representation vote taken under subsection 2 of section 7.”

By a decision of the Board dated April 28, 1980, the Board made the following ruling:

“Mr. J. Bowman, Labour Relations Officer, is authorized:

- (1) to confer with the parties as to the description and composition of an appropriate bargaining unit;
- (2) to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 8 of *The Labour Relations Act*;
- (3) to confer with the parties as to the description and composition of the voting constituency, and list of employees as of the terminal date in this matter to be used for the purposes of any vote that may be directed by the Board, the form of the ballot, the date and hour for the taking of the vote, and the number and locations of the polling places;
- (4) upon consent of the parties to investigate any other matter relating to the application; and
- (5) to report to the Board.”

3. On May 17, 1980, the Labour Relations Officer met with representatives of the applicant (and another trade union which indicated that it might be interested in the application although no formal intervention was filed). At this point the Plasterers' union had not filed a formal intervention and the respondent employer did not appear to take any active role in the meeting. Agreement was reached on the list of employees entitled to vote and arrangements were made for the taking of the vote on the respondent's premises, on either May 21, 1980 or May 28, 1980, between the hours of 7:00 a.m. and 8:00 a.m. It was agreed that there would be a “two-way” vote and that the applicant's name would appear on the top of the ballot and the Plasterers' name on the bottom of the ballot. Messrs. Zannese, D'Agostini, and Neil, all officials of the applicant, participated in these arrangements and agreed to them. No question was raised as to the status of the Plasterers as the “incumbent union”, nor was any objection taken to a “two-way vote” in which the employees would have the opportunity to choose which union they wished to represent them. In the result, the date of the vote was fixed for May 28, 1980.

4. By decision dated May 13, 1980, the Board established the voting constituency and found that the applicant had a sufficient appearance of membership support to justify the

taking of a representation vote. The Plasterers' union was listed as the "incumbent trade union" in the style of cause on this decision, and the Board confirmed that there would be a "two-way vote", in which voters would be asked to indicate whether they wished the applicant or the incumbent trade union to represent them. Notices of the taking of the vote (in Form 42) were sent to the respondent and duly posted on its premises. These notices recite the purpose of the vote and the agreed voting arrangements. The notice also contained a pictorial representation of the form of ballot which bore the name of both trade unions, and a space in which each employee could mark his choice.

5. After the vote was taken, representatives of the applicant and the respondent signed two separate documents certifying that the balloting was fairly conducted, and waiving any objections which they might otherwise have had to its regularity and sufficiency. These two documents (each of which, again, bears the name of the incumbent union in the style of cause) reads as follows:

"CONSENT AND WAIVER

We the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 28th day of May, 1980.

And we hereby waive any objections as to the regularity and sufficiency of the balloting.

Dated this 28th day of May, 1980.

CERTIFICATION OF CONDUCT OF ELECTION

DATE OF ELECTION — May 28th, 1980

PLACE OF ELECTION — Windsor, Ontario

We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote."

No one appeared to act as scrutineer for the incumbent union, which had still not filed a formal intervention. Rule 9 of the Rules of Practice provides that a trade union claiming to be the bargaining agent for a group of employees, which fails to file an intervention *may* be deemed by the Board to have abandoned any claim to represent the employees affected by the application; however, no request was made for an exercise of the Board's discretion under Rule 9 and the applicant was apparently content to have the ballots in the "two way vote" counted. It should also be noted that, by virtue of Rule 1(1)(b) a person (in this case the incumbent) served with notice of the Board's proceedings is a "party", and no objection to the incumbent's status as a party was taken until after the ballots were counted.

6. Seven ballots were cast. Of these one was spoiled and three were cast in favour of

each of the two unions. The applicant, therefore, did not receive *more than* fifty per cent of the ballots cast, and accordingly would not, on the basis of the representation vote be entitled to certification pursuant to section 7(3) of the Act.

7. The voting results were summarized in the report of the Returning Officer – a copy of which was sent to each of the parties. Accompanying the Officer's report was a notice in Form 44 advising the parties that if they wished to make representations in connection with the application, or as to any matter relating to the representation vote or the report, such representations should be made not later than June 4, 1980. The respondent was directed to post copies of the report in conspicuous places where they would most likely come to the attention of any of the employees affected by the application.

8. By letter dated June 4, 1980 (received by the Board June 5, 1980) the solicitors for the applicant for the first time, raised a number of objections and submissions concerning the incumbent trade union's status, the conduct of the vote, and the weight which should be given to the voting results. These representations were amplified at a hearing which took place on June 20, 1980. The applicant argues that the representation vote (which it must be repeated the applicant itself had requested) should be disregarded because the incumbent union had not filed a formal intervention or any collective agreement affirmatively establishing it as the bargaining agent for the subject employees. The applicant further argues that the incumbent has ceased to exist as a viable entity, or has abandoned any bargaining rights which it might have had. It was submitted that there should never have been a two-way vote, or indeed any vote at all, because there were no bargaining rights to displace. The applicant now asserts that the matter should be treated as an "ordinary" certification application in which the applicant's right to certification would be determined by its documentary evidence of membership support. In the alternative, the applicant requests the taking of a new representation vote because certain members of the bargaining unit were not fluent in the English language and did not fully comprehend the voting procedure. This, the applicant argues, was evidenced by the spoiled ballot and the fact that two employees who were scheduled to begin work at 10:30 a.m. on the morning of the vote did not appear to cast their ballots during the time the polling booth was open. Finally, the applicant contends that a ballot which should have been considered spoiled was improperly counted.

9. The incumbent Plasterers' union argues that it is now too late for the applicant to challenge the incumbent's status or bargaining rights. Having requested a representation vote and agreed to a "two-way" vote, the applicant cannot now repudiate the results of that vote and claim that the application should be treated as if no vote had been held at all. It might have been open to the applicant to make an "ordinary" certification application – in which case the incumbent would have had to establish its bargaining rights and status to intervene; however, after agreeing to a two-way vote, conducting the vote, waiving any objections as to the "regularity and sufficiency of the balloting", and losing the vote, the applicant cannot now raise these matters or reconstitute the application in a different form. Nor, having signed the above-mentioned waivers, can the applicant now claim that certain employees misunderstood the procedures or did not have a proper opportunity to cast their ballots. In the alternative, the incumbent argues that, in the circumstances, the onus of establishing an abandonment of bargaining rights or the disappearance of the incumbent union should rest with the applicant. Counsel filed with the Board employee bargaining agency designations dated April 27, 1978 and May 30, 1978; as well as a *purported* province-wide collective agreement between the Plasterers' union on behalf of, *inter alia*, Local 345 and the relevant employer bargaining

agency on behalf of, *inter alia*, Bravo Cement Contracting. It might be noted that Bravo Cement Contracting is specifically listed on the face of this purported agreement indicating its business address as that at which the vote was held. In reply, counsel for the applicant repeated his earlier submissions and asserted that the incumbent should be put to the strict proof that bargaining rights existed at the time of the employee designation and that Bravo was properly included in and bound by the province-wide agreement.

10. Because it was late in the day before this matter was reached, and two of the applicant's witnesses had come from out of town to give evidence, the Board heard the evidence of the two employees who had not voted – without prejudice to the incumbent's initial contention that it was too late to reopen the matter of the regularity of the vote.

11. The evidence of the two employees was virtually identical. Both employees were told by their employer that they would not be required to commence work until 10:30 a.m. on the date of the vote. There is no allegation that in scheduling employees to come to work at this time the employer was engaging in any improper conduct, or favouring either trade union. Both employees knew that a vote would take place on May 28th. Both of them saw the notice and both knew that it had to do with the representation vote. Each employee testified, however, that, since he could not read English, he did not understand the import of the notice. Neither employee sought a translation or clarification of the notice from the Board, their fellow-employees, their employer, or the two unions involved.

12. The applicant made a number of factual assertions and although no evidence was called on these points, the intervener indicated that it was not in a position to contradict them. In the circumstances, and for the purposes of this decision, the Board is satisfied that it should assume, without finding, that these assertions are true, and give its ruling on that basis.

13. Of the ten employees on the voters' list, three had not voted by the agreed closing time. Mr. D'Agostini, the representative of the applicant who had participated in the earlier meeting and agreed to the polling hours, requested that the poll be kept open longer; but the Board Returning Officer refused this request. Nevertheless, the applicant and the respondent signed the waivers mentioned in paragraph 5 and the ballots were counted. When the employees arrived at work some hours later, the vote was over.

II

14. As we have already noted, this matter came on for hearing late in the day, some of the evidence was heard as a matter of convenience, and many of the issues to which we have referred *supra* were characterized by the parties as "preliminary". It appears to the Board, however, that most of these matters are not properly characterized as preliminary, and that we are able to render a final decision in this case on the basis of the material presently before us.

15. We have examined the ballot which the applicant contends was spoiled, and should not have been counted. We are satisfied that the ballot does not disclose the identity of the individual marking it, and that it was properly counted. We are also satisfied that no new vote should be ordered, even if the evidence of the two employees who were too late to vote is accepted in its entirety. Notices of the vote were posted in accordance with the Board's Rules of Practice and these notices clearly spelled out the agreed voting arrangements. No objection to the form of notice was taken, and no attack was made on the adequacy of these notices, until

after the vote was taken and the ballots counted. Moreover, both of the subject employees actually saw the notices and knew that they related to the vote, but neither took the trouble to enquire as to their contents. It may have been that they were mistaken in their assumptions concerning the vote, but we do not think mistakes of this nature are sufficient to set aside the vote and order a new one. If voter errors were sufficient to set aside a vote, there would rarely be a representation vote which could not be challenged, since, presumably, spoiled ballots would always indicate some degree of employee misunderstanding. There is nothing to suggest that the employees were misled by the employer, the incumbent union, or even the notices themselves – they simply did not make the effort to ascertain their contents (as they no doubt did with respect to the applicant union's membership evidence – which is also in English). We do not think that the adequacy of a statutory notice can be assessed with reference to the intellectual or linguistic abilities of the persons to whom it may be directed – especially where, as here, no submissions were made that special efforts had to be made in this regard. In *Federated Building Maintenance*, [1979] OLRB Rep. Oct. 974 a similar attack was made on the adequacy of a Form 5 notice to employees of an application for certification and the Board made a number of observations which are equally applicable in the present case. At paragraph 12 the Board commented:

“12. Before parting with this matter, it should perhaps be added, if only to clarify the Board's procedure, that it is doubtful whether our conclusion would be any different even if the objection had been raised by a group of employees. There are over eighty Board forms, including its Notice to Employees of Application for Certification and of Hearing, all of which have been promulgated as regulations by the Lieutenant Governor in Council. They are always posted in English; the only qualification to that rule is that, upon request, the Board will provide a French translation for simultaneous posting with the English version. For years the Board has posted its notices in Canada's two official languages only without any apparent hardship to employees.

13. Obviously there are numbers of employees in the Canadian workplace who, by reason of their national origin, are not able to read or write either English or French. They are nevertheless usually quite able to function within the mainstream of everyday life in Canada. Whether they deal with commercial interests or with their government, they generally expect to do so in one of the two official languages of Canada. The same is true in their dealings with the courts or with public administrative tribunals. Immigrant Canadians generally obtain, and can reasonably be expected to obtain, the assistance necessary to enable them to respond to process issuing from a court or tribunal. In this case all 125 of the employees were able to respond to the Board's subpoena, written in English, issued to them by the employer. In the Board's experience employees who are not fluent or literate in English do not fall within a special class of disadvantaged workers. While the Board has always made use of translations in the receiving of evidence, it does not presume that immigrant Canadian employees are less able than others to inform themselves and assert their rights under *The Labour Relations Act*. (*IlSCO of Canada Ltd.*, [1973] OLRB Rep. May 221; *International Chinese Res-*

taurant, [1977] OLRB Rep. Oct. 688; *Dylex Ltd.*, [1977] OLRB Rep. June 357.)”

We do not think the language difficulties or misunderstanding of the two employees is sufficient, in the circumstances of this case, to set aside the representation vote. Finally, we do not think, having waived any objection to the regularity and sufficiency of the balloting, the applicant can now complain about spoiled ballots or the inadequacy of the voting arrangements. If that waiver has any effect at all, it must be to preclude precisely the kind of argument which the applicant is now trying to make.

16. We have also carefully considered the applicant’s representations with respect to the incumbent union’s existence, and its status as bargaining agent, and we have concluded that none of those arguments, or the evidence in support thereof, should now be entertained.

17. The applicant applied for certification and requested the taking of a prehearing representation vote. The request was granted, a voting constituency was established, a voters list was settled, and a vote was taken. The description of the unit of employees appropriate for collective bargaining is not in dispute, and we are satisfied that it should be framed in the same terms as the voting constituency. We are also satisfied, on the basis of the documentary evidence submitted that the applicant has the requisite membership support among at least thirty-five per cent of the employees in that unit at the time the application was made. In accordance with section 8(4) of the Act, a representation vote taken under section 8 has the same effect as one taken under section 7(2). On that basis the union “lost”. It did not receive *more than* fifty per cent of the ballots cast. There is no requirement that the Board disregard the voting results, and, in the circumstances of this case, we do not think we should do so. The applicant requested the taking of a vote, identified the Plasterers’ union as a party, agreed to its appearance on the ballot as an “incumbent union” which the employees could opt to support, did not request that the box be sealed, waived any objections concerning the regularity and sufficiency of the balloting, and agreed that the ballots should be counted. We do not think that this vote should now be disregarded, or that the applicant can now claim that no vote should have been taken or that its application should be assessed only on the basis of the documentary evidence. We are prepared to give weight to the representation vote which has been taken, and since on the taking of that vote, the applicant did not receive more than fifty per cent of the ballots cast, we are satisfied that its application must be dismissed. It is unnecessary to consider the applicant’s various arguments concerning the continuing existence of the incumbent Plasterers’ union or the possible abandonment by that union of its bargaining rights. We pass no opinion with respect to any of these issues.

18. The Board has further decided that, pursuant to section 92(2)(i) of the Act, it should not entertain a new application from the applicant, or by any of the employees affected by this application, or by any person or trade union representing such employees for a period of six months from the date thereof.

0596-80-U Labourers' International Union of North America, Local 183, Complainant, v. **Burlington Carpet Mills Canada Ltd.**, Leonard Roberts and Jim Garrot, Respondents.

Change in Working Conditions – Health and Safety – Whether discharge during freeze period absent anti-union motive violating section 70 – Treatment of statutory freeze under *The Labour Relations Act* and *Canada Labour Code* compared – Refusal to work because of danger to others – No advice to supervisors at time of refusal – No reasonable grounds for believing work unsafe

BEFORE: M. Picher, Vice-Chairman, and Board Members J. A. Ronson and H. Simon.

APPEARANCES: *L. Richmond, M. O'Brien, B. Yandell and P. Amaral for the complainant; Joseph Carrier and Jim Garrett for the respondent.*

DECISION OF THE BOARD; October 14, 1980

1. This is a complaint under section 79 of *The Labour Relations Act*. The union alleges that the respondent unlawfully discharged employee Gurdip Mushiana, contrary to the provisions of section 70(1) of *The Labour Relations Act* and that it discharged employee Paul Amaral contrary to the provisions of *The Occupational Health and Safety Act*, 1978.

2. The respondent raised a preliminary objection in respect of the allegation that it unlawfully discharged Mushiana. Its counsel submitted that the complaint does not, on its face, disclose a *prima facie* allegation of a breach of section 70(1) of the Act. For the purposes of the preliminary objection the parties were agreed as to the facts.

3. The complainant union was certified as bargaining agent for the employees of the respondent on December 10, 1979. It gave notice to bargain under section 13 of *The Labour Relations Act* on February 15, 1980. The parties proceeded through conciliation and a "No Board Report" issued on June 5, 1980. The section 70 prohibition against the employer altering terms or conditions of employment or the rights, privileges or duties of the employees continued in effect until June 19, 1980. Eventually the parties concluded a collective agreement.

4. During the freeze period, on June 11, 1980, Gurdip Mushiana was discharged by the employer. It is common ground that the discharge was not motivated by any anti-union sentiment, and it is agreed by the union that Mushiana's discharge did not interfere with any rights other than such rights as she or the union might have under section 70 of the Act. It was admitted that Mushiana's discharge was entirely motivated by normal business considerations. While the complaint initially alleged that the discharge was conducted in a manner contrary to the respondent company's established practice, that position was withdrawn at the hearing by the union. It rested the complaint on the footing that in Mushiana's discharge there had in fact been no change in the respondent's method of dealing with its employees. It nevertheless maintained that the discharge was without just cause and submitted that the merits of the discharge should be subject to the review of this Board pursuant to section 70 of the Act. The union acknowledges that it plainly is requesting a more far reaching interpretation of section 70 of the Act than the Board has yet rendered.

5. The union urges the Board to interpret section 70 more broadly in order to rectify

what it perceives as an imbalance in the operation of the section. The section provides as follows:

“(1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 13, in which case subsection 1 applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 45 and no collective agreement is in operation, any difference between the parties as to whether or not subsection 1 of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 37 applies *mutatis mutandis* thereto.”

6. The complainant argues that the section operates unevenly in a first agreement situation. When a union is negotiating the renewal of a collective agreement and it is alleged that during the freeze period an employee has been discharged contrary to the rights that he would have enjoyed under the prior collective agreement, the effect of subsection (3) of section 70 is to provide the employee access to arbitration as if the collective agreement was still in operation. In other words, if a collective agreement provides that an employee cannot be discharged except for just cause an employee discharged during the freeze period, who alleges that he was discharged without just cause is by the same token alleging a breach of his “frozen” rights and can have his discharge arbitrated under section 70(3) of the Act.

7. There is no arbitration provision equivalent to section 70(3) in relation to the freeze period that applies to the negotiation of a first collective agreement. The union nevertheless submits that section 70(1) should be construed in such a way as to provide the equivalent right through access to this Board by way of a complaint under section 79 of the Act. Specifically it submits that the prohibition against any change in “a term or condition of employment or any right, privilege or duty of the . . . employees” forecloses, for the duration of the freeze period, an employer’s right to discharge any employee without the consent of the union or, alternatively, without just cause, the merits of which are reviewable by this Board on a section 79 complaint.

8. In support of this proposition counsel for the union cited two recent decisions of the Canada Labour Board, *Bank of British Columbia* 80 CLLC ¶16,032; *Royal Bank of Canada* 78 CLLC ¶16,132. In those cases the Canada Labour Relations Board expressed itself on the scope of the statutory freeze of an employer’s right to alter terms and conditions of employment under the *Canada Labour Code*. Under that statute a freeze is imposed during the certification process by section 124(4) of the Code. A second, separate, freeze is imposed during bargaining by section 148(b) of the Code. Those sections provide as follows:

“124(4) Where an application by a trade union for certification as a bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay or any other term or condition of employment or any right or privilege of such employees until

- (a) the application has been withdrawn by the trade union or dismissed by the Board, or
- (b) thirty days have elapsed after the day on which the Board certifies the trade union as bargaining agent for the unit,

except pursuant to a collective agreement or with the consent of the Board.

143. Where notice to bargain collectively has been given under this Part,

- (b) the employer shall not alter the rates of pay, any term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 180(1)(a) to (d) have been met,

unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.”

9. Under the scheme of the federal statute the two freeze periods need not run together; there may be a hiatus in time between them. By contrast, section 70 of *The Labour Relations Act* provides for a single, continuous freeze on the employer’s right to alter terms and conditions of employment, commencing with receipt by the employer of notice of an application for certification and continuing through bargaining to the time at which a union may lawfully strike or an employer may lawfully impose a lockout.

10. The rights of an employer under the bargaining freeze of the *Canada Labour Code* and under section 70 of *The Labour Relations Act* are substantially different. An obvious difference is that the section 70 freeze stabilizes the rights and privileges of the employer as well as the rights and privileges of the employees. Section 148(b) of the *Canada Labour Code*, by comparison, does not expressly preserve any rights or prerogatives of the employer. That is how the section has been interpreted by the Canada Labour Relations Board, with the result that the operation of the freeze under the *Canada Labour Code* is remarkably different from the freeze provision that is applied by this Board.

11. The reasoning of the Canada Board in the *Royal Bank* case, to some extent amplified in the *Bank of British Columbia* decision, is that once a union has been certified as the bargaining agent of a group of employees the regime of collective bargaining is imposed in the work place and, by the effect of section 148(b) of the Code, the set of prerogatives that an employer might have enjoyed under a system of individual contracts of employment disappears. As construed by the Canada Board at page 449 of the *Royal Bank* decision, the freeze under the Canada Labour Code “is not to be interpreted by reference to contracts of employment or customs in effect prior to notice to bargain”. As a result, under that statute once notice to bargain is given after certification the union gains a status tantamount to full partnership in the business of the employer. As long as the freeze continues the employer cannot dismiss, lay off, transfer or discipline any employee without the union’s consent. As the Canada Board emphasized in *Bank of British Columbia* at page 14,312:

The union is an equal partner until the rules of employment and, in fact, rights of management are established in a collective agreement. . . . It is not and cannot be business as usual.

12. Section 70 of *The Labour Relations Act* establishes and preserves a very different set of rights. It expressly preserves the rights and privileges of the employer. The employer’s rights can only be referable to the rights it exercised before the freeze period began, except as those rights are expressly limited by section 70. Upon an application for certification the effect of section 70(2) of the Act is to expressly preserve those rights and privileges. That means that while the employer is prohibited from altering terms or conditions of employment and may not abrogate the existing rights and privileges of its employees without the consent of the union, it may nevertheless continue to operate its business with the right to dismiss, lay off, transfer or discipline employees as it did in the past, providing of course that it does so for motives that are not contrary to the Act.

13. Under section 70 of the Act notice to bargain does not extinguish an employer’s right to manage its business. Section 70 stabilizes the *status quo*, part of which is the

employer's right to conduct its business as it did before and part of which is the set of rights and privileges which have accrued to the employees by established practice. Section 70 of *The Labour Relations Act*, therefore, preserves both employee benefits and entrenched employer rights. It does not grant any new rights to employees or to a union save the right to be protected from any change in the *status quo* for the duration of the freeze.

14. The employer's right to carry on its business as it has, subject only to the stabilizing effect of section 70, was elaborated upon by the Board in *Spar Aerospace Products Ltd.*, [1978] OLRB Rep. Sept. 859; [1979] 1 Can LRB 61 at pages 68-9:

"The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

The Board recognizes that this approach differs from that taken by our federal counterpart in *Royal Bank of Canada*, *supra*. That Board appears to have interpreted the freeze as prohibiting any unilateral action by the employer during the period of the freeze. Such actions, in that Board's view, would be 'incompatible with the exclusive role of a bargaining agent and the collective regime of the Code'. This reasoning overlooks the fact that a full collective bargaining regime is not created by the mere giving of notice to bargain. Rather, during the period of the freeze, an interim legal regime is imposed by operation of section 70 as the parties move from the regime of the individual contract of employment to one governed by the terms of a collective agreement. This interim legal regime, in our view, should not place an employer in a legal straitjacket yet it should not at the same time lead to employees perceiving themselves as being penalized for engaging in collective bargaining. These two ends, in this Board's view, are best achieved by interpreting section 70 as requiring the parties to simply conduct 'business as before'."

15. Having regard both to the substantive difference between the freeze provisions of *The Labour Relations Act* and the *Canada Labour Code* and to the stabilizing collective bargaining policy expressed in *Spar Aerospace*, we see no reason to depart from this Board's established interpretation of section 70 of the Act. Given the express terms of section 70 of the Act it would, in our view, require an amendment of the section to produce the result argued for by the complainant. There is nothing in section 70 of *The Labour Relations Act* restricting the right of an employer to discharge an employee during the freeze period provided that the

decision to discharge is not itself an unfair labour practice and is made and implemented in a manner consistent with the prior operation of the employer's business. Given the agreement of the parties that those were the conditions which obtained in the discharge of Gurdip Mushiana the Board must find that the complaint does not disclose any *prima facie* breach of *The Labour Relations Act*. This aspect of the complaint is, therefore, dismissed.

16. We turn to consider the complaint in respect of Paul Amaral. The union alleges that he was discharged because he acted in compliance with *The Occupational Health and Safety Act, 1978*. Section 23 of that statute provides, in part, as follows:

“(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of this refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.”

17. Mr. Amaral worked for some two years as a counterman in the supply and receiving area of the respondent's plant. In June of 1980 he was assigned to the third shift, between 11:30 p.m. and 7:00 a.m. In addition to issuing parts to departments of the plant the duties assigned to him on the night of June 9, 1980 included unloading a trailer containing bales of fibre.

18. On the morning of July 10th it was discovered that none of the bales has been unloaded. Being told of that, Mr. James Garrett, Mr. Amaral's supervisor, checked the computer documents to determine the extent of Mr. Amaral's activity the previous night at the parts counter. He then found that Amaral had been involved in only ten transactions at the counter during his shift. Since it generally takes in the order of three to four minutes to issue a part, Mr. Garrett concluded that the grievor had done very little work during the shift.

19. Garrett summoned Amaral to his office, having previously noted that the grievor had two prior reprimands of his record during the same year. During that conversation Amaral agreed with Garrett that he had only made ten issues of stock during the shift in question. The Board accepts that when Mr. Garrett asked him what else he had done during the shift the grievor replied that he had done nothing. He offered no explanation for his failure to unload the trailer and specifically made no mention to Mr. Garrett of any failure or refusal to do the work but out of concern for his safety or anyone else's.

20. Before the Board Mr. Amaral testified that in fact he had not unloaded the trailer because he would have been required to do so with a forklift. According to his evidence the only safe way to perform the work would have been with a clamp truck, a type of tow motor which grasps bales of materials around their ends rather than cradling them from beneath as a forklift does.

21. Assuming, without finding, that the grievor did believe it was unsafe to work with a forklift, his right to refuse to work depends on there being reasonable grounds for his belief. His action must, in other words, be assessed by the objective standard of what would have been seen as unsafe by a reasonable employee with training and experience comparable to the grievor's. (*Inco Metals Ltd.*, [1980] July OLRB Rep. 981). The evidence establishes that clamp trucks and forklifts are used almost interchangeably in the unloading of trailers in the respondent's plant. There is ample evidence before the Board from other employees of the respondent that they see no danger in using forklifts for the kind of work Mr. Amaral was called to perform on the night in question.

22. Mr. Amaral's evidence, which is weak in many particulars, is especially weak in his explanation of his precise safety concerns. According to Mr. Amaral, the danger of using a forklift was not to himself but to others who might be injured as he attempted to stack the bales of material on the floor of the receiving area. The evidence establishes, however, that the area is virtually deserted at between 4:00 a.m. and 5:00 a.m., the approximate time at which the work would have been performed.

23. The Board is satisfied, on the whole of the evidence, that Mr. Amaral did not have reasonable grounds to fear for the safety of any other employee as a result of the work which was assigned to him. That conclusion is enough to dispose of the grievance.

24. For the sake of clarity, however, our conclusion in this regard would be no different even accepting that Mr. Amaral failed to do the work because of his personal preference for a clamp truck. The evidence leads the Board to conclude that even if that is true, Amaral did not in fact fail to do the work because of any concern for safety as contemplated by the Act. That an employee is more comfortable using one particular tool or device over another does not establish a right to refuse work under *The Occupational Health and Safety Act*. The fact that Mr. Amaral did not register any protest or refusal to perform the work with company super-

visors who were on the premises during his shift, that he did not in fact call his own supervisor to protest in that regard and that he did not raise any issue of safety in his meeting with Mr. Garrett the following day leads overwhelmingly to an inference that Mr. Amaral's failure to perform the work was not in fact motivated by any personal apprehension for his own safety or the safety of others. By discharging Mr. Amaral in these circumstances the respondent did not dismiss him contrary to the provisions of *The Occupational Health and Safety Act, 1978*. The complaint in respect to Mr. Amaral is, therefore, dismissed.

0952-80-R Nat Salvatore and John Gerlofsma, Applicants, v. United Steelworkers of America, Respondent, v. Canadian Gypsum Company Limited, Intervener.

Termination – Petition seeking termination circulated shortly after company posting notice advising employees of union request for further bargaining – Testimony before Board inconsistent and evasive – Circulation of petition on company premises during working hours – Whether voluntary

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *F. J. Matthews for the applicant; Elizabeth J. Shilton Lennon, Doug MacPherson and Harry Hynd for the respondent; Susan A. Bisset for the intervener.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; October 17, 1980

1. This is an application under section 49 of *The Labour Relations Act* for a declaration terminating the bargaining rights of the respondent trade union.
2. The respondent was certified as bargaining agent on March 28, 1979, for "all employees of the Canadian Gypsum Company Limited of Hagersville, Ontario, save and except foremen, people above the rank of foreman, office and clerical staff, technicians and students employed during the school vacation period". No collective agreement has ever been signed. A lawful strike commenced some time in September 1979 and dissipated some time in November. No further negotiating meetings have taken place since that time.
3. On June 17, 1980, royal assent was given to *The Labour Relations Amendment Act, 1980, (No. 2)*, S.O. 1980, c. 34, which in effect required a mandatory dues check-off clause to be included in any collective agreement thereafter concluded. The respondent union on June 23rd sent the following letter to the intervener employer:

"Delivered by Courier

June 23, 1980

Mr. L. Wright,
Plant Manager,
Canadian Gypsum Company Limited,
P.O. Box 99,
Hagersville, Ontario.
N0A 1H0.

Dear Mr. Wright:

Please be advised that we, the United Steelworkers of America, are prepared to sign a collective agreement based on the Company's final offer to us during our recent negotiations.

However, we would request that the Company make an amendment to conform to Bill 89 of the section on deduction of union dues. When this amendment has been made, we will be pleased to sign on behalf of the employees, as outlined in the certificate issued to us by the Labour Relations Board of Ontario.

While we recognize that we have been through some difficult times, we hope that the parties can now begin to build a good relationship that will serve us both well in the future.

I would appreciate this letter receiving the Company's early attention, and look forward to your response as soon as is possible.

Yours truly,

Henry Hynd,
Area Co-ordinator,
Haldimand Norfolk Region.

HH/p
opeiu-343

cc: Mr. W. C. Flemming,
Canadian Gypsum, Toronto.

(Registered Mail)"

The employer then posted this letter on the plant bulletin board, together with a memorandum which reads as follows:

"To all Employees

I was very surprised to receive this letter after the long silence from the steelworkers since the strike ended last November. Apparently it was

prompted by the new labour law provisions which allows unions to force all employees to pay dues as a contract provision.

I don't know how most employees feel about this."

4. The applicants filed with their application a number of signed statements indicating that the persons who signed no longer wished to be represented by the respondent trade union. These documents are in two forms. The handwritten documents bear the following preamble:

"We the undersigned Employees of the C.G.C. Hagersville Plant no longer wish the services of the United Steelworkers Union or any representation thereof."

In addition, there are typewritten documents which bear the following preamble:

"WE the undersigned employees of Canadian Gypsum Company Limited hereby signify that we no longer wish to be represented by the United Steel Workers Union."

5. The two applicants, Nat Salvatore and John Gerlofsma, each initiated a petition on their own, and were not, at the outset, acting in concert. The evidence of Mr. Gerlofsma is that there was much discussion amongst the employees following the employer's posting of the respondent's letter, and that shortly thereafter, a meeting took place at the plant amongst the various foremen and members of management. When Mr. Gerlofsma encountered his superintendent returning from the meeting, he inquired of the superintendent what was going on. The superintendent responded, according to Mr. Gerlofsma:

"I can't tell you what's going on but if you are interested in doing anything about it, I have some lawyers' names I can give you. I can't do anything else."

Mr. Gerlofsma testified further that he did not know why the superintendent thought he might want a lawyer. When the superintendent returned shortly thereafter with two names and telephone numbers on a slip of paper, Mr. Gerlofsma did, however, telephone the first of the two lawyers shown, and inquired what could be done about getting rid of the union. Mr. Gerlofsma then received advice in response to his query, and some time thereafter received from the lawyer (who represented him in these proceedings) the typewritten sheets now before the Board. Mr. Gerlofsma and Mr. Salvatore then called a meeting of the employees in the Hagersville Park. The meeting took place in the evening, after working hours, and was attended by a number of employees from the plant, who signed Mr. Gerlofsma's petition at that time. Mr. Gerlofsma testified that he subsequently asked other employees if they were interested in signing his petition as he saw them, and this appears to have occurred at non-working times or away from the plant. Beside each signature on Mr. Gerlofsma's petition is shown the date, time and place of signing. There are, however, interspersed with the signatures shown to have been collected at the meeting at the park, a number of signatures indicated to have been collected at other places and times, and no real explanation was forthcoming for this confusing sequence of signatures appearing on the face of the document.

6. The Board's main concern, however, is the evidence of Mr. Salvatore, who collected

by far the greatest portion of the 116 signatures on the combined petitions. Mr. Salvatore was less than convincing as a witness, and while he mentioned to the Board having a problem with his hearing, this by no means provided a complete explanation for the inconsistency and evasiveness of his testimony. With so major a participant, the Board could have little confidence that all of the material events surrounding the petition are before it, and on this basis alone it would be very difficult for the Board to be satisfied that the statements of desire represent a “voluntary” expression by employees, as required by section 49 of the Act. Mr. Salvatore, according to his testimony, for example, also received unsolicited from a foreman Maggio a slip of paper with lawyers’ names and telephone numbers on it. Notwithstanding this, Mr. Salvatore maintained that management had no knowledge of what he was doing. Cross-examined further on his, his evidence was as follows:

Q. Did Maggio know you were interested in phone numbers?

A. Don’t know. He just handed them to me and said they might help you.

Q. Why did he think you’d need help?

A. Can’t do a petition without a lawyer.

Q. So he knew you were taking a petition?

A. No, not then – just knew I didn’t want the union – it was a waste of money. I guess they knew when they saw the Labour Board notice posted.

7. Even if, however, one were prepared to accept Mr. Salvatore’s evidence on its face, serious difficulties still exist with respect to the present petition. It must be recalled that the petition began to be circulated shortly after the posting of the company’s memorandum, which concluded with the statement (which, to have any meaning, can only be characterized as a question): “I don’t know how most employees feel about this”. It is Mr. Salvatore’s evidence that at the time that he drafted and began to circulate the petition, he had no idea what he was going to do with it, and could give no indication of its purpose to employees that he approached. Indeed, it is not clear that employees at any time were told by Mr. Salvatore for whose eyes the petition was being circulated, and the Board finds that employees may well have construed it as a reply to management’s query. Mr. Salvatore further admitted on cross-examination that every one of the signatures which he collected (being some 87 names) were collected on company premises during working hours. While Mr. Salvatore is required in his job as a quality control tester to leave the lab and go into various areas of the plant for samples up to fourteen times a day, there was no suggestion in the evidence that his job requires him to obtain a signature on a piece of paper from the employees that he dealt with in the normal course of his duties, and it appears to the Board that the petitioning activities engaged in by Mr. Salvatore on such a broad scale would have been obvious to people generally in the plant. In all of the circumstances, the Board cannot be satisfied that there was not, on the part of the other employees, a perception that the petition being circulated by Mr. Salvatore was linked, or even directed, to management, and consequently that the identity of those who signed or did not sign would come to management’s attention. Because of the responsive and vulnerable nature of employees’ relationship to their employer, as alluded to by the Board on many

occasions in the past (e.g. *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813; *Pigott Motors*, 63 CLLC ¶16,264; *Peel Block Co. Ltd.*, 63 CLLC ¶16,227) the Board in circumstances such as these cannot be satisfied that the statement of desire represents a "voluntary" expression by the employees who have signed it.

8. It may well be that the posting of the company memorandum was an unlawful attempt to interfere with the relationship between the respondent trade union and the employees it represented, in violation of section 56 of *The Labour Relations Act*. We need not decide that however. What the company memorandum did do, was to make it difficult for any employee to satisfy the Board of the voluntariness, for the reasons stated above, of any petition following closely upon its heels. Counsel for the applicants exhorted the Board to consider the history of events preceding the posting of the company memorandum, and to speculate on whether or not a petition would have been voluntarily initiated and signed by the employees in any event. The Board, however, is required by the statute to make a finding that the statement before it was voluntarily signed by the employees in question. To do so, the Board must take the situation as it finds it, and as the parties themselves have created it. In the present case, as indicated, the Board finds that employees signing the petition may have had a reasonable apprehension that their decision to sign or not to sign would become known to management. Accordingly, the Board cannot conclude that the statement is "voluntary".

9. A further matter which has not gone unnoticed by the Board in this application is the apparently unsolicited initiatives by management of suggesting to both applicants that they consult with a lawyer. Mr. Gerlofsma, in particular, was sent in that direction "if he wanted to do something about it", and it is to be recalled that this assistance was offered in response to the simple question of "What's going on?" In view of the disposition of this matter, however, the Board need not consider this particular aspect further.

10. The application is dismissed.

DECISION OF BOARD MEMBER J. A. RONSON:

1. I agree that this application should be dismissed. The evidence of Mr. Salvatore and its presentation failed to meet the onus of proof upon the applicants in this matter. In saying this I am not agreeing with the comments expressed in paragraphs 7, 8 and 9 of the majority decision.

2049-79-M Group of Employees, Applicant, v. Central Park Lodges of Canada and Service Employees Union, Local 210, Respondents.

Employer – Parties – Practice and Procedure – Whether individual employees having standing to bring section 95(2) application – No disagreement over employee status between employer and union

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members E. C. Went and C. A. Ballentine.

APPEARANCES: *J. H. McGivney, Patricia Marion and Ruth A. Pentz for the applicant; John O'Donoghue for the respondent company; Ted Wohl and Tony Borg for the respondent union.*

DECISION OF THE BOARD; October 9, 1980

I

1. This is an application under section 95(2) of *The Labour Relations Act* made by a group of registered nursing assistants ("RNA's") employed by Central Park Lodges of Canada ("the employer") at its nursing home in Windsor. The first question which must be determined is whether the RNA's have the status to bring this application. Section 95(2) provides as follows:

"If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all Purposes."

2. The history of the proceedings between these parties is somewhat complicated but the principal facts are not in dispute. The Service Employees International Union Local 210 ("the union") is the bargaining agent for three bargaining units of the employer's employees: a "service unit" and two "nursing units". Bargaining rights with respect to the nursing units are based upon two certificates issued by this Board certifying the union as the bargaining agent of all full-time and part-time registered and graduate nurses regularly employed by the employer. There is no collective agreement in respect of the nursing units. The employees in the service unit are covered by a collective agreement which runs from January 1st, 1979 until January 31st, 1981. In article 2 of that agreement, the employer recognizes the union as the sole and exclusive bargaining agent for all employees, save and except supervisors and persons above the rank of supervisor, professional nursing staff, physiotherapists, occupational therapists, office and clerical staff and students employed for the months of June to September. Prior to July of 1979, the nursing home did not employ any RNA's and accordingly, on January 1st, 1979, when the service unit agreement began to operate, the words "professional nursing staff" could only apply to the registered and graduate nurses for whom the union had been certified some months before. The outstanding certificates in respect of nurses, the composition of the employee complement at the time the agreement was signed, and the apparent congruence between the agreement and the nurses' certificates all suggest that the phrase "professional nursing staff" refers to the registered and graduate nurses who were subject to a separate

certificate, and that all other employees (*excluding* physiotherapists, occupational therapists, office staff and students, but *including* RNA's) are covered by the service unit agreement.

3. In the summer of 1979, the employer advised the union that, for budgetary reasons, it intended to replace all of the registered nurses by RNA's and that the RN's would be indefinitely laid off. This prompted the union to file a complaint under section 79 of *The Labour Relations Act* alleging that the registered nurses were being laid off because of their trade union activity. The union contended that the scheme to replace the RN's by RNA's, was designed to undermine the union's bargaining rights, and that the employer had failed to bargain in good faith contrary to section 14 of the Act. Each of the RNA's filed an individual intervention in this application and all of them were made parties. Patricia A. Marion appeared at the hearing on their behalf—although it should be noted that she was not accompanied by counsel.

4. Counsel for the employer concedes that, at the hearing of the section 79 complaint, he submitted on behalf of the employer that the RNA's were *employees* within one or the other of the union's bargaining units. This submission was consistent with the outstanding agreement and certificates; moreover, an agreed statement of facts placed before the Board also suggests that such RNA's as the employer may have had from time to time, were employed in the service unit. The employer argued that since the newly hired employees would be represented by the union in any event, no anti-union inference should be drawn from its decision to replace registered nurses by RNA's. There was no suggestion that the RNA's would occupy managerial positions or constitute a new complement or "layer" of management. The registered nurses whom they were replacing had not been considered "managerial". The Board accepted and relied upon the employer's representations in coming to the conclusion that the employer's actions were not motivated by any anti-union animus. The Board reasoned that the employer would not undermine the union by substituting RNA's for registered nurses, and on that basis concluded that there was no basis for the union's charge of an unfair labour practice. The complaint was dismissed in a decision dated December 4th, 1979, [1979] OLRB Rep. Dec. 1145.

5. There followed an exchange of correspondence between the solicitor who had been retained by the RNA's and the employer. The recently hired RNA's did not wish to be represented by the union or pay union dues and, in a letter dated January 9, 1980, their solicitor raised *inter alia*, the question of whether they were "employees" under *The Labour Relations Act*. Section 1(3)(b) of *The Labour Relations Act* excludes from the definition of "employee" persons exercising managerial functions, but as we have already noted, prior to this letter the employer had not taken the position that the RNA's were members of management, and had, in fact, in the earlier section 79 proceedings, asserted that they were employees.

6. On January 21st, 1980, the employer wrote to the Board seeking a determination of a number of questions:

1. whether the RNA's were "employees" within the meaning of *The Labour Relations Act*;
2. whether the RNA's were included in the "service unit" defined in the collective agreement which it had recently signed;
3. whether the RNA's were included in the "nurses unit";

4. whether the RNA's by themselves constituted an appropriate unit for collective bargaining purposes.

The employer's letter was placed before the Board and treated as an application under section 95(2) of *The Labour Relations Act*. The Board held that, except for the question of the employee's status, none of the questions raised in the employer's letter was properly brought to the Board for determination under section 95(2). In respect of the employer's request for a determination of the "employee status" of the RNA's, the Board noted that the employer in the earlier unfair labour practice complaint had already submitted that these individuals were employees, and that the Board had accepted and relied upon that submission in reaching its decision to dismiss the complaint. In the circumstances, the Board held that the employer could not change his position and now assert that these individuals were not, in fact, employees within the meaning of the Act. The Board further noted that there was nothing before it to suggest that the duties expected of the RNA's had changed materially since the time of the earlier proceedings. By a decision dated March 12, 1980, the Board held that the employer could not relitigate the status of the RNA's and dismissed the employer's application.

7. On April 8, 1980, the solicitors for the employees wrote to the Board reciting the same questions which were previously pressed by the employer (i.e. whether the RNA's were employees, whether they were represented by the union, and whether they were "properly included" in the bargaining unit). Again, the Board considered the matter, and in decision dated April 23rd, 1980, decided to treat that letter too as an application under section 95(2) for a determination of the status of the RNA's. This, in turn, raised the question of whether a group of individual employees could apply under section 95 for such determination. The Board scheduled a hearing to entertain the parties' submissions on this issue. At that hearing the Board was advised that the union had filed a grievance alleging that the RNA's were covered by the "service agreement" and that a board of arbitration constituted in accordance with the terms of the agreement, would shortly consider this issue. One of the issues the arbitrator will have to determine is whether the RNA's are among the employees in the bargaining unit represented by the union.

8. The sole question before this Board is a narrow one: whether a group of individual employees can make an application under section 95(2) for a determination of their employee status when neither their union nor their employer has done so (or, in the present case, when their employer is prevented from doing so because of a position taken in previous proceedings before the Board). The circumstances giving rise to this question are somewhat unique, but the question itself is not. If the employees are right in their contention, then, at any time, an individual employee can call for a determination of his status whenever *he* has a question in this regard – thereby calling into question the employer's managerial structure, the scope of the collective agreement, and the distinctions between managerial and non managerial employees to which the union and employer have agreed. The union submits that section 95 was never intended to answer questions "at large" or which might arise in the mind of the individual employee; but only issues between the bargaining parties concerning the negotiation or administration of collective agreement's. There is no such issue here. The union also submits that all of the RNA's were parties to the section 79 complaint in which the Board finding is based on representations and an agreed set of facts which asserted that the RNA's were *employees*. The union contends that the RNA's cannot now claim they are not employees. It is unreasonable, argues the union, to suggest that the less skilled RNA's who have replaced the registered nurses constitute a new layer of management. In the union's view, the entire proceeding is a colourable device to subvert the union's bargaining rights by asserting managerial authority where none exists. These submissions have two separate aspects:

whether, as a general matter, individual employees can resort to section 95 for a determination of their status; and whether the RNA's participation in the section 79 proceeding precludes an application under section 95. In the circumstances, we have found it necessary to address only the first of these questions.

II

9. Counsel for the applicant employees submits that section 91(12) of the Act and the recent decision of the Divisional Court in *Carmen Fisher et al v. Hotels Clubs Restaurants, Tavern Employees' Union, Local 261, Fuller's Restaurant, and Ontario Labour Relations Board* (1980), 28 O.R. (2d) 462; 80 CLLC ¶14,021 requires the Board to entertain the employees' application. We have considered both section 91(12) and the court decision in *Fuller's Restaurant*, but have not found either very helpful in resolving the question presently before us. Section 91(12) does not address the question of who has status to initiate a proceeding; it merely specifies that those persons who are proper parties are entitled to an adequate opportunity to make their submissions. *Fuller's Restaurant* involved the right of individual employees to present their evidence in a certification application in which they had properly intervened in accordance with a rule (Rule 48) which specifically contemplates such intervention. Their status to intervene was not an issue. There was no doubt that an employee in a proposed bargaining unit has the status to intervene and is a proper party to a certification application (see *Nick Masney Hotels Limited*, [1970] 3 O.R. 461; 70 CLLC ¶14,202 (C.A.)); however, employees cannot *bring a certification application* – only a trade union can. Similarly, employees may have a right to intervene in proceedings before a board of arbitration, even though they are not parties to the collective agreement (see: *Hoogendorn v. Greening Metal Limited*, (1968), 65 D.L.R. (2d) 641 (S.C.C.)); but unless the agreement so provides, they cannot *initiate* a grievance – only an employer or a trade union can. Indeed, there is no doubt that if a section 95 application is made by one of the parties to the bargaining relationship, the individual employee affected would have the right to intervene and make his submissions. The Board has so held in *Brampton Transport Limited*, [1969] OLRB Rep. Jan. 1085. The issue in the present case, however, is not whether employees have a right to be heard when their interests are affected by section 95 proceedings; but whether they can, on their own motion, launch such proceeding when there is no questions between the employer or the trade union concerning the status.

10. Counsel contends that employees are vitally interested in the determination of their status, that important collective bargaining rights are involved and that the Board should not lightly conclude that they have no mechanism for resolving these questions. It must be remembered however, that within the context of collective bargaining this is not unusual. Terms and conditions of employment, wages, working conditions, pension benefits, seniority rights, job classification and promotion policy may all be jointly negotiated by the bargaining parties and are not subject to review or question by an individual employee. As we have already mentioned, disputes concerning the interpretation of the collective agreement may arise from, or materially affect the circumstances of an individual employee, but that employee may have no right to launch a grievance, and, (subject to section 60 of the Act) the union and employer may settle his grievance without his consent. Employee interest is not always sufficient to justify an independent right of action or review.

11. When put in an abstract form counsel's submission has a superficial attraction: employees are interested, "therefore" they "should" have an independent right of access to the Board despite the agreement of their employer and trade union. In a practical sense however,

what the submission amounts to is this: despite the agreement of the union and the employer that an individual is *not* a member of management, that individual may launch a proceeding before the Board for a declaration that he exercises managerial functions; or, alternatively, an individual whom both parties accept as a member of the management team can seek a declaration that he is not. In our view, this is a curious submission, and one for which it is difficult to discern a clear industrial relations rationale. An employee cannot question his terms and conditions of employment, nor, in most cases, the conduct of his bargaining agent; but, counsel contends, he can question his employer's managerial structure. No doubt individual managerial personnel may occasionally wish to dispute their management status, in order, for example, to participate in the benefits or the protection of a collective agreement; or, as the present case demonstrates, employees opposed to the union may look to a status determination as a means to avoid trade union representation. These motivations are readily understandable, but the real question is whether section 95 was intended for this purpose. And it can hardly further an orderly collective bargaining relationship if despite established practice, a collective agreement, or the specific agreement of the union and employer, an employee can assert that he is or is not a member of management, and is or is not covered by the collective agreement.

12. Before considering the decided cases concerning section 95, it may be useful to refer briefly to section 1(3)(b) of *The Labour Relations Act* – the “managerial exclusion” with which section 95 is closely connected. The purpose of the managerial exclusion has been succinctly stated in *Corporation of the City of Burnaby*, [1974] Can LRBR 1 at 3 as follows:

“The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management – on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for “cause” or passed over for promotion on the grounds of their “ability”. The employer does not want management's identification in the activities of the employee's union.

More subtly, but equally as important, the exclusion of management

from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the efforts is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law had directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it."

13. The managerial exclusion is designed to protect the institutional integrity of the bargaining parties and ensure that the bargaining relationship is not threatened by conflicts of interest. The section guarantees that the "bargaining table will have two sides". It is part of a general scheme (see sections 12, 40, 56) to maintain the separate identity and independence of the union and employer. The "mischief" to which sections 1(3)(b) and 95 are directed is unlikely to arise where the union and employer have mutually agreed on the appropriate dividing line between managerial and nonmanagerial employees. If neither of these parties perceives a threat to its interests, can an employee raise the matter in the context of a section 95 application? In the present case, of course, neither the trade union nor the employer is raising any question about the status of the applicants, or the potential threat to their collective bargaining interests which might flow from the inclusion of these employees in a bargaining unit. Indeed, even the employees themselves have not raised the issue on this basis. Their position with respect to trade union representation is rooted in their personal opposition to the union rather than a general concern about the integrity and independence of the bargaining parties. If the employees' concern is not one to which section 1(3)(b) was directed, was it intended that their concern could be raised under 95?

14. The necessity of a provision such as section 95(2) is readily apparent when one considers the dynamic nature of a business enterprise. After the establishment of a collective bargaining relationship, or the signing of a collective agreement, technological innovations, or changes in business conditions, may result in the creation of new job classifications, or the hiring of new employees. These changes in business organization may alter the duties of individual employees, or shift the focus of managerial authority in the organization, or raise a real question between the parties concerning the appropriateness of an employee's continued inclusion in the bargaining unit. Frequently, of course, these problems can be resolved by joint negotiation between the parties (although if the applicants are correct in their contention, the agreement which the parties may reach cannot be conclusive); or, if a dispute arises concerning the application of the collective agreement, the matter can be resolved by reference to a board of arbitration. (See *Re Canadian Industries Limited et al* [1972] 3 O.R. 63, where the Court of Appeal confirmed that a board of arbitration – to which only "the parties" have access – has jurisdiction to resolve certain employee status questions.) Section 95 provides an alternative route to which the parties can resort if they are unable to determine between themselves

precisely where the managerial line should be drawn. Counsel contends that, in addition, section 95 is open to individual employees whenever they may have some question concerning their membership on the management team, and further that section 95 can be invoked even though the union and employer have resolved this question to their satisfaction. It is not unusual, in the Board's experience, for employees to overestimate or underestimate their importance in the employer's organizational scheme, nor is it uncommon for employees to misunderstand the true extent or limits on their authority. It is evident therefore that, if section 95 is available in any large enterprise, the number of employees and the volume of organizational changes or employee turnover would create a potential for litigation under section 95 which is almost limitless. Given the disparate views which employees might have concerning the value of trade unionism, and the variety of advantages which could be obtained from inclusion or exclusion from a bargaining unit there is a real likelihood that such litigation would be forthcoming – with obvious impact on the stability of the bargaining relationship. While we do not suggest that these consequences can be permitted to confute the clear meaning of the statute, where the language of the statute is ambiguous, it is a matter of real significance whether the interpretation urged upon us would lead to practical or impractical consequences.

15. The contention of the applicant in the present case has been considered and rejected in at least three previous Board cases. In *Wallace Barnes Limited* 61 CLLC ¶16,198, an employee claimed that she had been improperly discharged and that by virtue of section 1(2) of the Act [which provides that a person does not cease to be an employee by reason of a discharge contrary to a collective agreement] and 95(2), the Board had jurisdiction to determine whether she was still an employee. In dismissing the application the Board commented:

“In sum, then, it appears to us that when the Legislation is looked at as a whole section 68 [now section 95] subsection 2, is designed to deal with questions which may arise between the parties who are negotiating a collective agreement and between the parties to a collective agreement during its operation. Moreover, in our view, it was never intended that employees should be able to refer a question under section 68(2) to the Board but rather this was to be left to one or more of the parties to the agreement. While in a sense employees in the bargaining unit are parties to a collective agreement, since a trade union acts as their bargaining agent, having chosen that agent to act on their behalf they are bound by its actions and, if a collective agreement exists, by the terms of that collective agreement.”

In *Indusmin Limited* [1975] OLRB Rep. March 184, a request by individual employees for a determination of their status was also rejected. Finally, in *York University* [1978] OLRB Rep. August 790, the Board dealt with a situation in which a group of employees alleged that they were “guards”, and thereby excluded from a bargaining unit because of section 11 of *The Labour Relations Act*. As in the present case, neither the union representing them, nor their employer regarded them as “guards” and it was acknowledged that they had been treated as employees by the parties’ collective agreement. In dismissing the application, the Board had this to say:

“In our view there must be a present question arising between the parties to the collective bargaining relationship before there can be a section 95(2) referral. Certainly, it is clear that for a question to arise “in the

course of bargaining for a collective agreement" it could be necessary for such question to be raised in the "bargaining forum" and must therefore be a question between the parties to that bargaining relationship i.e. the bargaining agent and the employer; we are of the opinion, that it is no less implicit in the language of the section that the question which must arise during the period of operation of the agreement must also be a question between the parties to that agreement."

16. In *York University*, the Board found that the "guard's exclusion" was intended to protect the interests of the employer, since the inclusion of guards in the bargaining unit might generate a conflict of interest with respect to the protection of the company's property. Section 95(2), in turn, was "intended to promote the stability of labour relations by making available a forum for the settlement of particular questions, where there are interfering with the general collective bargaining relationship". Where the parties had agreed that the employees in question were not "guards", there was no interference with the collective bargaining relationship; and where the company itself had treated the alleged guards as ordinary employees, the Board saw little likelihood of subverting the interests which section 11 was designed to protect. In the result, the Board found that section 95 was restricted to question which arose *between the parties*, at the bargaining table, or pursuant to the administration of the collective agreement.

17. In our view, the scheme of the Act, the decided cases, and the ramifications of an alternative interpretation, all support the inference that section 95(2) was only intended to resolve disputes between the immediate parties to the bargaining relationship. Section 1(3)(b) is designed to protect the institutional interests and integrity of the bargaining parties; but no such interests are at issue here, and it is unlikely that the mischief to which section 1(3)(b) is directed would arise where the company and the union have mutually agreed on the distribution of "managerial" authority, the composition of the "managerial team", and the scope of the bargaining unit. Indeed, if the parties have been able to reach such agreement, there are good policy and practical reasons why it should not be disturbed. It would not further a stable collective bargaining relationship if the parties could be plunged into litigation on matters which they have already settled—even though an individual employee may be dissatisfied with that settlement. Moreover, it seems strange, from a practical point of view, to suggest that the Board should be entertaining applications brought for the purpose of demonstrating that a company has more (or fewer) managers than either it or the employees' bargaining agent think it has. We agree with the view expressed by the Board in *York University*, *supra* that it is implicit that a "question" arising during the negotiation of a collective agreement must involve a question *between the bargaining parties* which must be resolved in order to assist them to reach a collective agreement; and that it is also implicit that a "question" arising during the operation of the collective agreement, is intended to refer to disputes between the parties who have a responsibility for administering that agreement (i.e. the trade union and the employer). Having carefully considered the various submissions of the parties, we are satisfied that section 95 was only intended to resolve issues between the bargaining parties; and was not intended to provide a forum in which employees could question their status when that status was not a matter of dispute between their employer or their trade union. In our view, it is implicit that the "question" to which section 95 refers must involve a question arising between the bargaining parties during the negotiating or operation of the collective agreement.

18. In the result, we find that the procedure prescribed by section 95 is not available to

individual employees, and the application must be dismissed. It is unnecessary to consider the effect if any, of the employees' participation in the section 79 complaint, which was determined, as we have noted on the basis of an agreed statement of fact and submissions that they were "employees" in the service unit. Likewise, we need not speculate and make no comment on the result if the employees, through a trade union of their choice, made a timely certification application raising the questions set out in paragraph 6 (above).

1254-80-M; 1255-80-M; 1256-80-M The Continental Group of Canada Ltd., Employer applicant, v. United Steelworkers of America, Trade Union applicant, v. Employee, Objector.

Collective Agreement – Both parties seeking consent to early termination – Objection to consent by employee – Relevant criteria reviewed for granting consent

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members J. D. Bell and D. B. Archer.

DECISION OF THE BOARD; October 21, 1980

1. These are three applications under section 44(3) of *The Labour Relations Act*. The United Steelworkers of America ("the union") and the Continental Group of Canada Ltd. ("the company") have jointly applied to Board for consent to an early termination of certain collective agreements between them. The parties have indicated that early termination of these agreements will facilitate renegotiation of the terms and conditions of employment at "Plant no. 10" in the Borough of Etobicoke; and further that such renegotiation is necessary in order to improve the competitive position of that plant and prevent its closure. The parties advise that they have already negotiated the terms of a "replacement" agreement, and that those terms have been ratified by the employees affected. Section 44 reads as follows:

(1) If a collective agreement does not provide for its term of operation or provides for its operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

(2) Notwithstanding subsection 1, the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon thirty days notice to the other party.

(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

(4) Notwithstanding anything in this section, where an employer joins an employers' organization that is a party to a collective agreement with a trade union or council of trade unions and he agrees with the trade union or council of trade unions to be bound by the collective agreement between the trade union or council of trade unions and the employers' organization, the agreement ceases to be binding upon the employer and the trade union or council of trade unions at the same time as the agreement between the employers; organization and the trade unions or council of trade unions ceases to be binding.

(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

Section 44 of the Act provides that a collective agreement must have a *specific* term of at least one year, which cannot be altered by the parties without the consent of the Labour Relations Board. The parties may revise the substantive terms of the agreement, but they cannot change its term of operation.

2. At first glance, it might seem odd that the parties to a collective agreement cannot by mutual consent alter its term of operation; however, the reason for this restriction becomes apparent when one considers that the agreement prescribes not only the terms and conditions of employment, but also the time when employees are permitted to challenge their union's position as bargaining agent. Sections 5 and 49 of the Act provides that applications for certification or termination can only be made during the last two months of the collective agreement's operation – that is, during the so-called “open period”. An alteration of the term of the collective agreement, therefore, can effect the rights of third parties. If a union and employer could alter the agreement's term of operation, the “open period” could be eliminated or postponed, and with it, the right of employees to challenge their union's status as bargaining agent. To avoid this possibility, the statute provides that the term of the collective agreement must be fixed, specific, and not subject to variation without the consent of the Labour Relations Board.

3. Before granting its consent to an early termination of an outstanding collective agreement, the Board seeks to assure itself that such action will not prejudice the rights of interested individuals or trade unions who may be planning to challenge the incumbent's bargaining rights during the open period. Notices of the application are forwarded to the employer for posting on its premises in such conspicuous locations that they will most likely come to the attention of the employees concerned. These notices must remain posted for at least five days and a declaration by the employer that this has been done must be filed with the Board. In the instant case, the notices read as follows:

**“NOTICE OF APPLICATION FOR EARLY TERMINATION OF
COLLECTIVE AGREEMENT”**

To the employees of: The Continental Group of Canada Ltd.

A joint application, copies of which are attached hereto, has been made by the above employer and United Steelworkers of America, AFL-CIO.

The aforementioned Agreement would normally terminate on February 15, 1981.

Any person having objection to the granting of such consent shall file the same with the Board, or or before the 29th day of September, 1980.

In default of filing a Notice of Objection as aforesaid, the Board may take such action in the matters as may appear to the Board to be just.

Dated this 22nd day of September, 1980.

4. The employer has filed a declaration indicating that the proper notices were posted. Presumably in response to the postings, the Board has received an objection to the application in File No. 1254-80-M from Mr. Robert Hall, who would appear to be an employee in the relevant bargaining unit. The basis of Mr. Hall's objection is dissatisfaction with the new terms and conditions of employment which the employer intends to implement, with the agreement of the union, following the termination of the existing agreement. There is nothing before the Board to suggest that Mr. Hall or any other employee seeks to challenge the union's position as bargaining agent, and as we have already noted, the purpose of the restriction in section 44(3) is to prevent the parties from undermining the right to make a representation application during the open period. This is "the mischief" to which section 44 is directed, and there is nothing before the Board to suggest that this "mischief" exists in the present case. Accordingly, we are satisfied that the Board should grants its consent to early termination of the parties' agreements.

5. For the purpose of clarity, the Board notes that the sole issue before it is whether, in the circumstances of this case, it should grant its consent to an early termination of the parties' existing collective agreements. For the reasons we have given we are satisfied that such consent should be granted. We make no comment on the terms or legal effect of the documents which the parties have indicated they intend to execute if such consent is granted. Equally, we express no opinion on the remedies, if any, which may be available to an individual employee who is dissatisfied with the arrangements the parties may enter into. It suffices for this case, to say that we are satisfied that the parties should be permitted to terminate their agreements early, and hereby grant our consent to their doing so.

1093-80-R International Union of Operating Engineers, Local 793, Applicant, v. **D. L. Stephens Contracting Niagara Limited**, Respondent, v. Christian Labour Association of Canada, Intervener.

Bargaining Unit – Construction Industry – Craft unit carved out of all employee unit

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *J. Redshaw and B. McMillan for the applicant; W. J. McNaughton and D. L. Stephens for the respondent; Fred Heerema for the intervener.*

DECISION OF THE BOARD: October 7, 1980

1. The Board finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*. The Board further finds the application to be timely pursuant to section 5 of the Act.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 127(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

3. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act* and is an application made pursuant to section 131a(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The applicant is seeking to be certified as the bargaining agent for a unit of "operators" (i.e. employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in repairing and maintaining of same) employed by the respondent in Board Area #5. The applicant is a craft union, and the unit applied for is its regular craft unit.

5. The respondent and the intervener were, on the date of the making of the application, parties to a collective agreement covering a bargaining unit comprised of both construction labourers and operators employed by the respondent in Board Area #5. Thus to certify the applicant for its proposed bargaining unit would require the “carving out” of a unit of operators from the bargaining unit currently represented by the intervener. The intervener acquired its bargaining rights with respect to both the construction labourers and the operators by virtue of a single certificate issued by this Board in August of 1972.

6. In circumstances such as this the Board has the discretion to decide whether or not it will allow a craft unit to be carved out of a larger bargaining unit represented by an incumbent trade union. Both the respondent and the intervener submitted that such a carving out should not be allowed in the circumstances of this case, particularly having regard to their past history of bargaining on behalf of both construction labourers and operators at the same time.

7. In an identical case between the same parties to present case (Board File No. 1093-76-R decision dated January 31, 1977) the Board dealt with this matter as follows:

When determining bargaining units in the construction industry in situations where the mandatory craft provisions of section 6(2) do not apply, the Board has always placed great weight on the fact that organization in the construction industry has traditionally been on a craft basis. Because of this the Board's practice has been to allow craft unions to carve out from larger bargaining units units of employees who pertain to their particular craft. (For a full discussion of this practice see *Kent Tile & Marble Co. Ltd.* 61 CLLC para. 16,204. The attention of the parties is also drawn to the *J. D. Coad Construction Company Limited* case [1969] OLRB Rep. Sept. 755). Having carefully reviewed the evidence and representations of the parties in this regard, we do not feel that the facts of this case warrant a departure from this practice. It is thus our conclusion that a separate bargaining unit of operators employed by the respondent in Board Area #5 would be an appropriate bargaining unit for which to certify the applicant.

8. The Board further finds that pursuant to section 131a(1) of the Act that all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and the County of Haldimand, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 10, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. A representation vote will be taken of the employees of the respondent in the bargaining unit described in paragraph 8. All employees of the respondent in the bargaining

unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

11. Voters will be asked to indicate whether they wish to be represented by the applicant or by the intervener in their employment relations with the respondent.

12. The Board further directs that a Labour Relations Officer meet with the parties within fifteen (15) days hereof to make the necessary arrangement for the taking of this representation vote.

13. The matter is referred to the Registrar.

1967-77-R Labourers' International Union of North America, Local 527, Applicant, v. **Duron Ottawa Ltd.**, Respondent, v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull, Intervener.

Certification – Construction Industry – Application filed by local union – Whether application properly brought

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *S. B. D. Wahl, B. Carrozzi and P. Kent for the applicant; Everett Colton for the respondent; Denis Power and Maurice Savage for the intervener.*

DECISION OF THE BOARD; October 21, 1980

1. In a letter dated August 11, 1980, the intervener has raised an issue with respect to the jurisdiction of the Board to entertain this application for certification. This issue has been raised more than two years after the filing date of this application. The Board ruled during one of the many days of hearing of this application on August 13, 1980 that it would entertain the representations of the parties on the issue raised by the intervener.

2. In its letter dated August 11, 1980, the intervener has stated:

On April 27th, 1978, the Minister of Labour, pursuant to *The Labour Relations Act* designated Employer and Employee Bargaining Agencies. The employer designation authorized a council of associations as employer bargaining agent to represent all employers whose employees were represented by a number of bargaining agents, one of which was Local 124. It is submitted that Local 124, at the relevant time, was party to collective agreements with both above named Respondent employers.

The original employee designation dated April 27th, 1978, authorized the

International Cement Masons union and the Ontario Provincial Conference as employee bargaining agent to represent all journeymen and apprentice cement masons represented by a list of bargaining agents, including Local 124. This authorized bargaining with the designated employer bargaining agent which in turn represented the two above mentioned employers.

Pursuant to such designations, provincial collective agreements were entered into. Xerox copies of the cover pages are enclosed so as to identify the parties.

The first provincial agreement was effective from October 2nd, 1978 to April 30th, 1980. The current agreement runs from May 1st, 1980 to April 30th, 1982.

These designations were, of course, made pursuant to Bill 22 known as The Labour Relations Amendment Act, 1977, which received third reading on October 25th, 1977. Bill 22, as you know, involved some rather sweeping changes to labour relations in the construction industry. It was, therefore, necessary to pass a section declaring that the new provisions prevailed over other possibly contradictory provisions of the Act. See Section 126.

It is submitted that on April 27th, 1978, at the latest, the Board lacked jurisdiction to deal with applications in the Ontario construction industry except as contemplated in Bill 22.

Section 125(2) of the Act, as amended, provides that employers represented by a designated employer bargaining agency are deemed to have recognized all affiliated bargaining agencies represented by a designated employees bargaining agency in their respective geographic jurisdictions "except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights." The applicant herein is not such a bargaining agent. It should be noted that the applicant herein did not request a reference under Section 127(4).

Reference is also made to Section 130 which establishes that the bargaining rights of Local 124 rested [sic] in the designated employee bargaining agencies. The designated bargaining agencies have not been made parties to these proceedings. Local 527 of the Labourers lacked status to launch these applications.

Section 132(3) establishes that provincial agreements entered into after Bill 22 are binding. The two provincial agreements above referred to were and are, therefore, binding. To certify the applicant in these proceedings would be contrary to the extent and purpose of the Act.

Local 124 submits that, should these applications not be forthwith

dismissed by the Board at this time, the designated bargaining agencies should be given notice of the proceedings.

3. At the hearing the Board entertained the representations of the parties. In our opinion, the intervener's argument fails to distinguish between the acquisition of bargaining rights and the organization of bargaining rights at the provincial level for the purpose of collective bargaining. The vesting of bargaining rights of an affiliated bargaining agent in an employee bargaining agency by virtue of section 130 of the Act is only for the purpose of conducting bargaining. The effect of sections 132(2) and 132(3) has been considered by the Board in the *Riverside Roofing Limited* case, [1978] OLRB Rep. June 567 and the *Malen Steel & Salvage Company Limited*, case [1978] OLRB Rep. May 435. In those cases the Board concluded that section 132 did not override those sections of the Act which provides for the selection by employees of a bargaining agent. There is nothing in the provisions of Bill 22 which prevails over the provisions of section 5. The Board finds that this application is timely under the Act and that the Board has jurisdiction to entertain this application.

4. At the hearing on August 13, 1980, the intervener informed the Board that it was not prepared to call evidence. In a decision dated March 5, 1980, the Board, in an effort to give the intervener every opportunity to establish its allegations, directed the intervener to file its allegations with the Board and directed the Registrar to serve the parties named by the intervener with notice of this application and the intervener's allegations and to list this application for continuation of hearing on all outstanding issues. The intervener did not comply with this direction.

5. Having regard to the evidence and representations before it, the Board finds that the intervener does not have bargaining rights for any of the employees who are affected by this application. The Board further finds that the applicant does not have bargaining rights for the employees who are affected by this application. The intervener's allegation that the Board should not certify the applicant because of the provisions of section 12 of the Act is dismissed. The Board also dismisses the intervener's allegations with respect to section 61.

6. In this application for certification the applicant filed six combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within six month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed one certificate of membership. The certificate is signed by the member and indicates that monthly dues of \$8.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The certificate is checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.

7. The Board further finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

8. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

9. Having regard to the provisions of section 6(1) of *The Labour Relations Act*, the

Board further finds that all cement masons, cement masons' apprentices and construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of nonworking foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The applicant filed evidence of membership of the type referred to in paragraph six on behalf of four of the six employees who were at work and included in the bargaining unit on the date of the making of this application and who comprise the list of employees for the purpose of the count.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 4, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.

0848-80-R International Union of Operating Engineers, Local 793,
Applicant, v. **E & E Seegmiller Limited**, Respondent, v. Teamsters'
Construction Council of Ontario, Intervener.

Practice and Procedure – Parties disputing scope of examiner's hearing – Board directing show cause hearing

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *B. Fishbein and J. Redshaw and R. Watson for the applicant; James A. Costigan for the respondent; Douglas J. Wray, A. Marinelli and David McKee for the intervener.*

DECISION OF THE BOARD; October 9, 1980

1. The present application was made on July 21, 1980. On August 11, 1980 the Board endorsed the record in this case appointing a Labour Relations Officer to inquire into and report to the Board on the list and composition of the bargaining unit herein. Subsequently, the Examiner held a number of hearings in the performance of his duties set out in the endorsement of the Board.

2. This matter was listed for hearing on October 3, 1980 with the following specific purpose set for that hearing:

THE PURPOSE OF THIS HEARING IS TO PERMIT THE PARTIES TO SHOW CAUSE WHY THE LABOUR RELATIONS OFFICER WHO HAS BEEN APPOINTED IN THIS MATTER SHOULD INQUIRE INTO THE DUTIES OF THE PERSONS WHO ARE CLASSIFIED AS DRILLERS AND ROCK TRUCK DRIVERS (HAVING REGARD TO THE BARGAINING UNIT FOR WHICH THE APPLICANT IS SEEKING CERTIFICATION)

3. The applicant in this matter takes the position that it is clear on the basis of the Board's jurisprudence that the persons classified as drillers in the instant application are clearly labourers and since the applicant trade union is seeking its usual unit of equipment operators, any inquiry into the work performed by the persons classified as drillers would be simply a delay of the Board's proceedings since it is beyond doubt that drillers could not be on the list of employees in the bargaining unit.
4. With respect to the persons classified as "rock truck drivers", the applicant takes the position that these persons are teamsters and that there is a jurisdictional agreement between the applicant and the intervener council that rock truck drivers are not in the operating engineers' jurisdiction but are in the teamsters' jurisdiction. The applicant points out that in fact the Board has certified the teamsters for such employees in the past.
5. The respondent, which apparently has a collective agreement with both the applicant and the intervener relating to the Kitchener area, argues that an inquiry into the duties of drillers and rock truck drivers is necessary since the local collective agreement with the operating engineers in the Kitchener area includes both classifications in the collective agreement. In addition, the employer submits that there are other collective agreements throughout the province with these two classifications covered by the operating engineer's bargaining unit.
6. With respect to the classification of drillers, it is clear that the respondent's agreement in the Kitchener area is an anomaly and the Board quite clearly regards such employers as construction labourers, (see the Board's decision in *Kaymick Enterprises Ltd.*, Board File No. 1093-79-R decision of the Board dated July 30, 1980). It will, therefore, not be necessary for the Labour Relations Officer in this matter to inquire into the duties of the persons classified as drillers.
7. With respect to the persons classified as rock truck drivers, however, it is clear that the respondent's apprehension, that such persons driving "off the road vehicles" might be included in the classifications to the collective agreement, is a valid apprehension. It is not the purpose of the present hearing to foreclose any arguments which the respondent might take in that regard.
8. At the hearing in this matter, the applicant also argued that the conduct of the respondent in this matter was such that the Board's proceedings for certification were being delayed to the point of an abuse of the Board's proceedings. There is no doubt that the proceedings of the Labour Relations Officer in this matter have been protracted to the point where they may in fact constitute an abuse of the Board's proceedings.
9. In view of the above reasons, the parties and the Labour Relations Officer are

directed to resume the Labour's Relations Officer's inquiry as expeditiously as possible. The Officer will not be required to inquire into the duties of the persons classified as drillers. The Officer will report on the duties of the persons classified as rock truck drivers. However, the Board notes at this point the undertaking of the employer at the hearing to proceed with this matter as an agreed statement of fact rather than through the calling of witnesses. The matter is therefore referred back to the Labour Relations Officer.

0072-80-R United Steelworkers of America, Applicant, v. Empco-Fab Ltd., Respondent, v. Group of Employees, Objectors.

Practice and Procedure – Representation Vote – Twenty ballots cast – One ballot segregated – Parties requesting count subject to determining eligibility of segregated ballot, if necessary – Ten ballots for and nine ballots against applicant – Board directing new vote – Secrecy of wishes of employees casting ballots maintained

BEFORE: George W. Adams, Chairman and Board Members J. D. Bell and W. F. Rutherford.

DECISION OF THE BOARD; October 2, 1980

1. This is an application for certification.
2. By decision dated May 14th, 1980 a representation vote was directed with respect to all employees of the respondent company in Whitby, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff. This representation vote was conducted on July 3rd, 1980.
3. Twenty employees cast ballots. Ten such ballots were marked in favour of the applicant and nine ballots were marked against the applicant. Mr. L. Chisamore presented himself to the returning officer to cast a ballot. Mr. Chisamore's name was not one on the voting list. However, he was permitted to vote and his ballot was segregated and not counted. In signing the consent and waiver form, the representative of the respondent reserved his right to investigate the status of Mr. Chisamore.
4. On July 25th, 1980 the Board appointed a labour relations officer to inquire into the duties and responsibilities of L. Chisamore. The report of the labour relations officer is dated September 3rd, 1980.
5. Mr. Chisamore is employed as a welder who spends seventy (70) percent of his time welding with the rest of his time allocated to testing and checking welds under the company's Canadian Welding Bureau program. He reports to Albert Blower, a foreman. His monthly report on welds is sent to the Canadian Welding Bureau. This report lists employees and what qualifications they hold. He acts as a conduit to the employer with respect to the works conformity to C.W.B. standards. He makes no recommendations nor does he have any control over what actions the employer should take on the basis of his report. He does not

participate in the hiring process, and he is an hourly rated employee. He plays no role with respect to the discipline of employees. He can grant no time off.

6. From all of the above it is clear that L. Chisamore is an employee of the respondent and thus, he comes within the bargaining unit. However, the counting of Chisamore's ballot would, in the circumstances, reveal how he voted. All employees who participate in a representation election are entitled to a secret ballot vote. The parties before this Board know that when they agree to count the ballots in circumstances as those in the instant case they run the risk of the Board directing another representation vote in order to protect the secrecy of the wishes of the employees who cast segregated ballots. See *Corporation of the Township of Chinguacousy*, [1973] OLRB Rep. July 380 and *Super City Discount Foods Limited et al*, [1977] OLRB Rep. March 175. Therefore, the Board directs that another representation vote be taken.

7. The representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

0139-80-U Ontario Public Service Employees Union, Complainant, v. The Board of Governors of The Fanshawe College of Applied Arts and Technology, J. A. Colvin and W. Collard, Respondents.

Discharge for Union Activity – Grievor filing complaint under collective agreement – Whether grievor exercising rights under *The Colleges Collective Bargaining Act*

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members C. G. Bourne and B. L. Armstrong.

APPEARANCES: *G. Richards and Dr. B. P. Sinha for the complainant; Corinne Murray and Peter Myers for the respondents.*

DECISION OF THE BOARD; October 8, 1980

1. This is a complaint under section 78 of *The Colleges Collective Bargaining Act*. The complaint states as follows:

“On or about March 28, 1979 the grievor was dealt with by J. A. Colvin, President of Fanshawe College and W. Collard, Chairman of the Mathematics and Science Division of the respondent contrary to the provisions of Section 76, of the Colleges' Collective Bargaining Act in that they did on their own behalf or on behalf of the respondent terminate the employment of Dr. Sinha in response to Dr. Sinha initiating action under the Grievance Procedure of the Collective Agreement. Dr. Sinha was objecting to a memo of March 8, 1979 from W. Collard.”

2. Section 76, and in particular section 76(2)(a) reads as follows:

“76.-(2) The Council, an employer or any person acting on behalf of an employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;...”

3. The respondents took the position that even if the complainant were to prove that his action in filing a grievance contributed to his termination, such action did not constitute the exercise of a right under the Act, and on that basis alone the complaint must fail. The parties agreed to ask the Board for an interim ruling on this point.

4. The respondents point to section 47 of the Act as the only provision coming close to covering the present situation. That section, like section 37 of *The Labour Relations Act*, requires that a collective agreement provide for the final and binding settlement by arbitration of all differences arising under a collective agreement, and in section 47(2) includes a “deemed provision” should the collective agreement fail to do so. The present collective agreement does not fail to do so, and subsection (2) has no application. But, in any event, the present case does not involve the submission of a matter to arbitration. It simply involves the filing of a grievance pursuant to a grievance procedure, which is not a right made mandatory by the provisions of section 47.

5. Section 66 of the Act, however, provides:

“Every person is free to join an employee organization of his own choice and to participate in its lawful activities.”

Counsel for the respondent argued that the meaning of this section is limited in its application to matters which may be described as being the “property” of the union, on a more or less unilateral basis. The Board sees no justification in the language of the section for adopting this limited approach, and notes that the respondent’s interpretation would appear to exclude the act of collective bargaining itself. Nor would it seem to make sense to impute to the Legislature the clear intent that persons be protected under the Act when submitting a matter to arbitration, but not when filing the initial grievance.

6. In Article 9 of the collective agreement, the parties have fashioned a grievance procedure which includes the raising of “complaints” as a preliminary step to the filing of a grievance. That Article provides as follows:

“Article 9 GRIEVANCE PROCEDURE

9.01 Sections 9.01 to 9.05 inclusive apply to an employee covered by this Agreement who has been employed continuously for at least the preceding six months.

9.02 Complaints

It is the mutual desire of the parties hereto that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, he shall discuss it with his immediate Supervisor within twenty (20) days of the occurrence or origination of the circumstances giving rise to the complaint in order to give his immediate Supervisor an opportunity of adjusting his complaint. The discussion shall be between the employee and his immediate Supervisor unless mutually agreed to have other persons in attendance. The immediate Supervisor's response to the complaint shall be given within seven (7) days after discussion with the employee.

9.03 Grievances

Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under Section 9.12(d)) in the following manner and sequence provided it is presented within seven (7) days of the immediate Supervisor's reply to the complaint. It is the intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College written decisions at each step shall contain reasons supporting the decision.

Step No. 1

An employee shall present a signed grievance in writing to his immediate Supervisor setting forth the nature of the grievance, the surrounding circumstances and the remedy sought. ..."

In the Board's view, the right to ensure compliance with a collective agreement under procedures such as those set out above is a fundamental "lawful activity" of a trade union, within the meaning of section 66, and is no less so where aspects of that right are delegated to the aggrieved employee himself. The Board rules, therefore, that the allegations of the complainant, if proven, would constitute a violation of section 76(2)(a) of *The Colleges Collective Bargaining Act*.

7. The matter is directed to the Registrar for continuation.
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1101-80-JD Essex and Kent Building and Construction Trades Council, on its own behalf and on behalf of its members listed on Schedule "A" attached hereto; and The Trade Unions listed on Schedule "A" attached hereto, Complainants, v. **Ford Motor Company of Canada Limited**, Essex Manufacturing, and Ensate Limited; United Automobile, Aerospace and Agricultural Implement Workers of America; United Automobile, Aerospace and Agricultural Implement Workers of America, Local 200; and Contractors listed on Schedule "B" attached hereto, Respondents.

Jurisdictional Dispute – Reconsideration – Board amending interim order

BEFORE: George W. Adams, Chairman and Board Members H. J. F. Ade and M. J. Fenwick.

APPEARANCES: *A Minsky and others for the complainants; D. J. M. Brown for Ford Motor Company of Canada Limited, Essex Manufacturing and Ensate Limited; and L. A. MacLean, Q.C. for the United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 200.*

DECISION OF THE BOARD: October 29, 1980

1. This matter involves a complaint made under section 81 of *The Labour Relations Act*. An interim order was issued by decision dated September 9th, 1980 and the respondents Ford Motor Company of Canada Limited, Essex Manufacturing and Ensate Limited now seek to vary that order to add the following work:

- (a) Installation of closed circuit T.V. system;
- (b) Installation of the assembly inspection devices (A.I.D.) for engine assembly;
- (c) Installation of the energy monitoring system;
- (d) Installation of the compressed air system; and
- (e) Installation of the hot test and cold test equipment.

A more complete description of the work is attached to the respondents' request made by letter of October 20th, 1980.

2. It is apparent from a review of the complainants' complaint (particularly paragraph 4) that the work that is subject to the instant request by the respondent employers was being claimed by the complainant trade unions at the time the Board issued its initial interim order. Similarly, a review of the reply filed by the respondent trade unions reveals that they too were claiming this same work at the time the complaint was initially filed with the Board. Having regard to the representations of the parties at the hearing of the instant matter, the Board is satisfied that the earlier positions of both the complainants and respondents with respect to this work remain unchanged and that, therefore, the conditions giving rise to the initial request for an interim order continue to prevail.

3. Counsel for the complainant trade unions also reminded the Board that he expressed concern at the initial consultation convened under section 81(8) of *The Labour Relations Act* that the interim order might be too narrowly drafted if it dealt only with the work contained in the reply filed by the respondent companies and that he sought the right to return to the Board to obtain a more complete interim order should circumstances so dictate. Indeed, counsel submitted that the instant matter would have been brought by the complainant trade unions had the employers not acted on their own initiative.

4. Having regard to the representations of the parties and to the matters raised in the earlier consultation conducted by the Board, the Board is satisfied that this is an appropriate situation to exercise its jurisdiction to vary an order or direction under section 95(1). (See *Bakery and Confectionery Workers Union v. White Lunch Limited* (1966), 66 CLLC ¶14,110 (S.C.C.).) Therefore, having regard to the foregoing the Board deems it advisable in all the circumstances to vary the aforesaid interim order so that it now provides:

The respondents Ford Motor Company of Canada Limited, Essex Manufacturing, and Ensite Limited shall assign all of the following work to members of the appropriate trade unions listed on Schedule "A" attached hereto.

- (i) The receipt, unloading and transportation of all components and materials and the installation to a complete and finished state of those components and materials in relation to a "public address system" throughout, but not necessarily limited to, the plant area;
- (ii) The receipt, unloading and transportation of all machinery, equipment, conveyors and other related material for the piston, and rod and piston assembly areas. The installation of the aforementioned machines, equipment, conveyors and other miscellaneous material within the aforementioned areas including support systems which include but are not limited to air, electric and fluid systems to a complete and finished state;
- (iii) The receipt, unloading and transportation of all equipment, conveyor systems and other material that relates to piston, and rod and piston blue steel chuting. The installation of the aforementioned material including support systems including but not limited to air, electric and fluid systems to a complete and finished state;
- (iv) The receipt, unloading and transportation of all equipment, machinery and material relating to Engine Assembly Sections A, B, C and D and installation of this equipment, machinery and material, including support systems relating to the aforementioned Engine Assembly Sectins A, B, C and D to a complete and finished state;
- (v) The receipt, unloading and transportation of all material relating to secondary lighting systems. The installation of the aforementioned material including, but not limited to, support structures and electrical hookups to a complete and finished state.
- (vi) The outside portion of the installation of the closed circuit T.V. system.

(vii) The installation of the assembly inspection devices (A.I.D.) for engine assembly.

(viii) Installation of the compressed air system.

(ix) Installation of the hot test and cold test equipment.

This order shall be effective forthwith and shall remain in effect until such time as the Board issues a further order. Any party may apply for a more detailed description of the work should this be necessary.

5. The Registrar is directed to schedule this matter for hearing on its merits.

1790-79-U United Steelworkers of America, Complainant, v. Fotomat Canada Limited, Respondent.

Duty to Bargain in Good Faith – Strike – Company counsel unavailable to meet and substituting other spokesmen – Later negotiations curing previous unlawful conduct – Refusal to agree to compulsory check-off – Company withdrawing outstanding offer upon passage of legislation implementing compulsory check-off – Strike continuing due to employer's unlawful bargaining – Board directing reinstatement of striking employees and other relief

BEFORE: George W. Adams, Chairman and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *James Hayes and Michael Schuster for the complainant and John P. Sanderson, Q.C. and Heather T. Laing for the respondent.*

DECISION OF CHAIRMAN GEORGE W. ADAMS; October 24, 1980

1. This matter, filed on December 14, 1979, involves a complaint alleging that the respondent has acted contrary to sections 14, 56, 58 and 61 of *The Labour Relations Act*. It is brought by the United Steelworkers of America on its own behalf and on behalf of the employees of the respondent it represents. In its initial filing with the Board the complainant requested the following relief:

- 1) Declaration that the Respondent has violated the Labour Relations Act;
- 2) Cease and desist order from continued unlawful conduct;
- 3) Direction to bargain in good faith and more particularly to:
 - (i) table forthwith a complete proposal, and

- (ii) attend at all negotiations with spokespersons with full authority to act for the respondent, and
 - (iii) cease and desist from its rigid and predetermined position on union security and
 - (iv) schedule early meetings under the auspices of mediation services and attend for such periods of time without adjournment as the mediator shall direct.
- 4) Damages to the union and members of bargaining unit flowing from the unlawful conduct payable with interest as appropriate.
 - 5) Such further and additional relief as counsel may advise at the hearing and the Board see fit to grant.

2. The facts will reveal that the matter, on the agreement of the parties, did not come on before the Board as originally scheduled and in its request of June 25, 1980 that the case be rescheduled for hearing, the complainant asked for the following additional relief:

- 1) Direction that the respondent attend forthwith at a meeting under the auspices of mediation services and table the proposal tendered by it to the union on February 25, 1980;
- 2) Direction that the respondent re-employ all striking employees who wish to return to work at the conclusion of the strike notwithstanding any limitations contained in section 64 of the Act;
- 3) Direction that the respondent provide to the union a list containing the names, addresses, and telephone numbers of all persons recruited as replacements for striking employees which the respondent intends to retain in the bargaining unit after the conclusion of the strike; the union undertakes to maintain said list in the custody of responsible union officials.
- 4) Direction that the respondent post a Board Notice in the usual form in every location of the respondent where the employees work for a period of sixty working days.

FACTS

3. Most of the material facts are not in dispute, but the submissions of the parties and the substantial relief requested require a review of the evidence in considerable detail. The complainant has been certified by the Board to represent various bargaining units of employees of the respondent in various parts of Ontario. The locations which are the subject of these certifications and the dates of issue of the said certificates are set out in the respondent's reply in the following form and are not in dispute.

<u>Location of Certification</u>	<u>Date of Issue</u>
(i) Warden Avenue	February 26, 1979
(ii) Scugog	April 17, 1979
(iii) Metropolitan Toronto	April 17, 1979
(iv) Oshawa	April 17, 1979
(v) Newcastle	April 17, 1979
(vi) Peterborough	May 18, 1979
(vii) Markham	May 18, 1979
(viii) Trenton	May 18, 1979
(ix) Belleville	May 18, 1979
(x) Oakville	May 18, 1979
(xi) Port Hope	May 18, 1979
(xii) Lindsay	May 23, 1979
(xiii) Caledon	June 14, 1979
(xiv) Ajax	June 14, 1979
(xv) Bradford	July 30, 1979
(xvi) Barrie	August 8, 1979

4. With the exception of the certification of the Warden Avenue location, all of these certificates pertain to employees engaged in retail stores. The Warden Avenue certification relates to route drivers and maintenance employees. The Board was advised that the total employment of the respondent in the Province of Ontario is somewhere between 250 to 300 employees and that the certificates cover approximately 130 of these employees. Accordingly, each certificate relates to a relatively small number of employees.

5. It is not disputed that notices to bargain for the various locations were given on the following dates:

(i) Warden Avenue	March 1, 1979
(ii) Scugog	April 23, 1979
(iii) Metropolitan Toronto	April 23, 1979
(iv) Oshawa	April 23, 1979
(v) Newcastle	April 23, 1979
(vi) Peterborough	May 31, 1979
(vii) Markham	June 4, 1979
(viii) Trenton	May 31, 1979
(ix) Belleville	May 31, 1979
(x) Oakville	May 31, 1979
(xi) Port Hope	May 31, 1979
(xii) Lindsay	June 1, 1979
(xiii) Caledon	June 19, 1979

- | | | |
|-------|----------|--|
| (xiv) | Ajax | June 20, 1979 |
| (xv) | Bradford | Set out in complainant's Request for Appointments of Conciliation Officer as August 2, 1979 but apparently not received by the respondent. |
| (xvi) | Barrie | July 31, 1979 |

6. In May 1979 the respondent appears to have retained the law firm of Hicks Morley Hamilton Stewart Storie to conduct negotiations for it and the parties met on May 23, 1979 to set "the ground rules" for the negotiations. A second meeting was arranged for June 8, 1979; however, on or about that same time John C. Murray of the Hicks Morley firm, advised the complainant that his law firm was no longer representing the respondent. Soon after, the complainant trade union applied for conciliation services (i.e. on June 13, 1979). William Mills, assigned to conduct negotiations on the complainant's behalf, explained this action on the basis that he had tried to telephone Dave Gillespie, Group Manager of the respondent, but his telephone calls were not returned. A second request for conciliation services in relation to the additional locations certified after June 13 was made on October 23, 1979. The two requests for conciliation services by location are set out in the respondent's reply at paragraph 5 and are not disputed:

- | | | |
|-----|--|------------------|
| (a) | Warden Avenue, Scugog,
Metropolitan Toronto,
Oshawa, Newcastle, Peterborough,
Markham, Trenton, Belleville,
Oakville, Port Hope and Lindsay; | June 13, 1979 |
| (c) | Caledon, Ajax, Bradford and Barrie | October 23, 1979 |

7. The respondent subsequently retained the law firm of Stikeman, Elliot, Robarts and Bowman and Fred von Veh of that law firm advised Mills on June 20, 1979 that he would be representing the respondent in negotiations. A meeting between the parties was scheduled for June 28, 1979 for the purpose of reviewing all outstanding matters. At that meeting Mills and von Veh discussed certain complaints relating to alleged unlawful terminations for a number of employees during organizing and the proposed format for future bargaining. With respect to the former, von Veh promised to look into the matters raised and with respect to the latter some confusion appears to have resulted. Mills testified that he proposed that the parties focus their attention on the largest bargaining unit (Metropolitan Toronto) and the language for the other units would subsequently "fall into place" in all probability. On the other hand, the respondent later objected to the Minister's issuance of "No-Board Reports" in respect of all locations represented by the complainant on the basis that it believed negotiations had been confined to the Municipality of Metropolitan Toronto. Whatever the actual agreement of the parties, neither party took the precaution of recording this agreement by way of written memorandum or letter. Mills testified that at the June 28, 1979 meeting it was further agreed that he would make a complete set of proposals on the understanding that monetary issues would be left to the end of bargaining. It was also agreed that the parties would meet again on July 13, 1979.

8. In the particulars filed with the Board by the respondent it is stated that Mills agreed to provide von Veh with a copy of his proposals before July 13 and that the July 13 date was

cancelled by von Veh when Mills failed to honour this undertaking. We have already observed that the parties did not record their understandings of June 28 in writing; Mills denied the undertaking to provide von Veh with a copy of his proposals before the next meeting in his testimony before the Board; and von Veh did not testify. Having regard to the evidence before us, we accept Mills' version of the meeting's cancellation wherein he stated that von Veh telephoned him on July 12 and advised that he had an emergency meeting in Windsor on July 13th. This was the first unilateral cancellation of a meeting by the respondent. The next meeting was arranged for July 30, 1979. It was a date that had already been set by Fraser Kean, the Conciliation Officer appointed by the Minister of Labour. This meeting was to be held at the offices of the Conciliation Service at 400 University Avenue in Toronto. The complainant delivered its proposals to von Veh on July 27, 1980 at Kean's request, but von Veh apparently advised Kean that he could not attend at the July 30th meeting in any event. No one for the respondent testified to explain von Veh's failure to attend the July 30th meeting. The next meeting was arranged for August 10, 1980 at 400 University Avenue. At this meeting von Veh presented the complainant with the respondent's counter proposals. The parties also reviewed the complainant's earlier allegation that the respondent had improperly terminated several employees during the complainant's organizing drive. Mills testified that von Veh said "Steelworkers are all the same, you're the only union who insists on union security in a first agreement and I'm not prepared to discuss it." Von Veh did not testify before the Board and, on the evidence, we are satisfied that the statement was made. Mills also testified that von Veh was carrying on a conciliation meeting for another client at the same time and had to leave both meetings by the noon hour. Mills, however, advised von Veh at this meeting that the complainant wished its own language to be adopted on union security and this language made both union membership and the check-off of union dues compulsory. Article 6 of the union's proposal reads:

CHECK-OFF – UNION SECURITY PROVISIONS

- 6.01 Effective within thirty days of the date of signing of this Collective Agreement, each employee shall be and remain a member of the Union in good standing, as a condition of employment.
- 6.02 The Company shall deduct, as a condition of employment, from the wages of each employee in the bargaining unit, union dues, and assessments in the amount certified by the Union to the Company to be currently in effect according to the Union constitution. Such deductions shall be made from the first pay period of each calendar month, and shall be remitted within fifteen days and made payable to the International Secretary-Treasurer of the United Steelworkers of America and forwarded directly to him. The monthly dues remittances shall be accompanied by a complete check-off list and the amount of dues and sums equivalent to Union dues, for the pay period in which the deduction was made.
- 6.03 No deduction shall be made from the pay of any employee in any month where the employee has worked only five days or less. (Paid days on vacation and paid statutory holidays will be considered as days worked.)
- 6.04 The Union will save the Company harmless from any and all claims which may be made by employees against the Company for amounts deducted from wages in accordance with the terms of this Article.

Article 6 of the respondent's proposal provided:

CHECK-OFF – UNION SECURITY PROVISIONS

- 6.01 The Company agrees, during the lifetime of this agreement, to the extent authorized in writing by each employee, but not otherwise, to deduct whatever sum may be authorized for union dues from the first pay due each calendar month, and to remit same not later than the fifteenth day of the same month to the Secretary-treasurer of the Union. Any such authorization (which shall be agreed to as to form and substance between the Company and Union) shall be in duplicate and shall be signed by the employee concerned and witnessed. It shall be on a form approved by the Union and the Company and shall take effect after fifteen days from the date of signing.
- 6.02 The Union agrees to save the Company harmless from any and all claims which may be made by employees against the Company for amounts deducted from wages in accordance with the terms of this Article.

9. August 22, September 6 and 7 were set for following meetings. However, von Veh failed to attend the August 22 meeting and, instead, directed Andra Pollak, a law student, to attend the meeting of August 22, 1979 on the respondent's behalf. Mills testified that she advised him that she had no authority to amend, change or agree to proposals and that she was there only to listen to the complainant. Neither von Veh nor Pollak gave evidence to explain why she had been inserted into the negotiations and the Board, therefore, accepts Mills' testimony in this respect. Conciliator Kean prevailed on Mills to remain at the meeting and make the best of the situation. Mills then raised with her a number of the grievances referred to above and a few days later Pollak called to advise that the respondent would reinstate two persons and that it was still investigating the details surrounding the status of two others. At that same meeting Pollak and Mills agreed that the wording of some eleven provisions were similar, but Pollak lacked authority to give the respondent's agreement. Accordingly, over the summer von Veh cancelled or failed to attend three of four meetings scheduled and had to leave early the one meeting he did attend.

10. The parties met again on September 6, 1979 and this time the respondent was represented by Steve McCormack, an associate of von Veh. McCormack assured Mills he possessed the authority to conduct negotiations. Mills was encouraged by the progress achieved in this meeting and did not take issue with paragraph 26 of the respondent's particulars recording the breadth of the negotiations on that day. Paragraph 26 reads:

At this meeting Mr. McCormack redrafted various provisions of the Respondent's counterproposals in order to facilitate the acceptance by the Complainant of these Articles in accordance with the comments and objections which had been received by Miss Pollak. The following is a list of those Articles which were agreed to between the parties at the meeting of September 6, 1979:

(i) Article 4 – Management Rights

This Article was agreed to in its entirety following the Respondent's

amendment in paragraph 4.01(c) to the effect that the Complainant would be consulted prior to the making, enforcing or alteration of Rules and Regulations to be observed by the employees.

- (ii) Article 5.02 and 5.03 were withdrawn from the table by the Respondent.

- (iii) Article 6.02 was agreed to.

- (iv) Article 7.01 – union representation

The Respondent moved from an age requirement of 21 years for Union stewards to 18 years of age for Union stewards.

- (v) Article 7.05

The entire Article was agreed to following the Respondent's withdrawing paragraph 7.05(e) and the Complainant undertaking to provide a letter of intent in regard to paragraph 7.05(e).

- (vi) Article 8 – Adjustment of Grievances

Article 8.01 – agreed, and

Articles 8.03, 8.04, 8.05, and 8.06 were agreed following the Respondent's amending its position concerning the time frame within the grievances would be adjusted.

- (vii) Article 9 – Arbitration Procedure

The Respondent agreed that its present Articles 8.07 through to 8.16 be amended and numbered Articles 9.01 through to 9.10.

- (viii) Article 10 – Discharge Cases

Article 10.01 was agreed to following the Respondent amending its position concerning the time frame within which a grievance would be lodged.

- (ix) Article 11 – Seniority

Article 11.01 was agreed.

Article 11.03 – the Complainant was advised that the Respondent would redraft its language and present the redrafted language at the next meeting.

Article 11.06(a), (b), and (d) was agreed.

(x) Article 12 – Job Posting

The Complainant was advised that the Respondent would redraft its proposed language and provide same at the next meeting of the parties.

(xi) Article 13 – Bulletin Boards

Articles 13.01 and 13.02 were agreed.

Article 13.04 was withdrawn by the Respondent and the Respondent advised that it would be redrafting its proposal with respect to this provision.

(xii) Article 14 – Hours of Work and Overtime

The Complainant was advised that the Respondent would be tabling its proposals for this Article at the next meeting between the parties.

(xiii) Article 15 – Vacations with Pay and Article 16 – *Statutory Holidays*

The Complainant was advised that these provisions would be drafted and proposals tabled at the next meeting of the parties.

(xiv) Article 17 – Leave of Absence

This Article was agreed following the Respondent's amending its language concerning notice to the Respondent.

(xv) Article 21 – Safety – was agreed to.

At this juncture negotiations concluded for the day and the Complainant was advised that those provisions which the Respondent had agreed to redraft would be tabled at the meeting which was scheduled for the next day, that is, September 7, 1979.

11. Negotiations continued on September 7, 1979. Mills did not take issue with paragraph 29 of the respondent's particulars recording discussions on that day. Paragraph 29 reads:

On September 7, 1979, the parties again met (Mr. Mills and his negotiating committee, Mr. McCormack and Mrs. Hallett and Fraser Kean) and a decision was made that the Complainant and the Respondent would meet on a one-to-one basis and that Mr. Kean would only become reinvolved if the parties felt his assistance necessary. Mr. McCormack, on behalf of the Respondent, then tabled the Respondent's proposed language concerning those Articles, which the Complainant had been

advised on the previous day would be tabled by the Respondent, and in particular, the following:

(i) Article 11.03

Amended language was proposed and the Complainant agreed to this provision.

(ii) Article 13.04

An entire new provision was drafted by the Respondent and agreed to by the Complainant.

(iii) Article 14 – Hours of Work and Overtime

The Respondent's language for this particular Article was given to the Complainant.

(iv) Article 16.01 – statutory holidays – was given to the Complainant.

(v) New Article – Jury Duty – was given to the Complainant.

(vi) Article 9 – Arbitration Procedure – was agreed to by the Complainant.

(vii) Article 11.08

Was agreed to after the Complainant was advised that the Respondent's language proposed therein reflected language set out in the Complainant's proposals for a collective agreement.

(viii) Article 12.01

The Respondent amended its language concerning the filling of vacancies on a temporary basis.

In addition to these items, various other items were discussed and at approximately 2:00 o'clock in the afternoon the Complainant replied to the Respondent's counterproposals and discussions ensued for the remainder of the day. At the conclusion of negotiations for the day, it was agreed that negotiations would continue on September 27, 1979. McCormack further advised Mr. Mills of the Respondent's position in the very near future. On or about September 11, 1979, Mr. McCormack advised Mr. Mills by telephone that the Respondent was confirming the position that had previously been given to Mr. Mills by Mr. von Veh concerning the alleged employee grievances, and that if the Complainant felt the allegations were warranted, that Section 79 Complaints should be filed.

12. As these particulars reveal, another meeting was arranged for September 27. A few

days before this date the complainant was advised that one of the respondent's principals would not be available and that the meeting would therefore have to be cancelled. At about the same time Mills was pressing Kean to cause the release of a "No Board Report" presumably to create some greater urgency on the part of the respondent and the respondent advised Kean that it had no objections to the release of such report. It was also agreed that the parties would meet again on October 12, 1979. A "No Board Report" dated October 1, 1979 was issued on or about October 11, 1979 with respect to the June 13, 1979 conciliation request which provoked an objection from the respondent by letter dated October 12, 1979 on the basis that the parties had been bargaining only with respect to the Municipality of Metropolitan Toronto bargaining unit. The parties, however, met as agreed on October 12, 1979, where McCormack advised Mills of the respondent's objection to the issuance of the Minister's "No Board Report". Mills was also advised of an "emergency" back in McCormack's office requiring his absence between 11:00 a.m. and 1:00 p.m. But before his departure, McCormack tabled proposals on some six provisions which Mills considered during the noon hour break. On McCormack's return the parties discussed or agreed to the following items outlined in paragraph 34 of the respondent's particulars:

- (i) Article 2.01 — agreed
- (ii) Article 2.03 — agreed
- (iii) Article 3.02 — agreed
- (iv) Article 10.01 — agreed
- (v) Article 14.01 — agreed
- (vi) Article 14.03 — agreed
- (vii) Article 14.02 — There was discussion concerning the fact that various members of the bargaining unit presently enjoyed hours in excess of those hours set out in Article 14.02. The Complainant was advised by Mr. McCormack that the Respondent would draft language to protect the hours of certain individuals and that this would be reflected in a letter of intent to be provided by the Respondent. In addition, there was discussion concerning the payment of travel time and travel allowance for those employees who moved from location to location for the Respondent. It was tentatively agreed at this time that these individuals would be paid travel time and would be paid public transit travel allowance and that the Respondent would draft language to that effect.
- (viii) Article 14.04 — agreed
- (ix) Article 14.05 — agreed
- (x) Article 14.06 — agreed
- (xi) Article 14.09 — agreed
- (xii) Article 15.01 — agreed
- (xiii) Article 15.02 — agreed
- (xiv) Article 15.03 — agreed
- (xv) Article 22 of the Complainant's demands – Credit Union – was withdrawn by the Complainant.

13. They then, as recorded in paragraph 35 of the respondent's particulars, agreed on

the items which remained outstanding and the complainant made its first monetary demand. Paragraph 35 reads:

At this point in time Mr. McCormack and Mr. Mills agreed that the following were those items which remained outstanding:

Articles 3.01, 5.01, 6.01, 7.01, 11.02, 11.06(e), 11.09, 12.01, 14.02, 14.08, Article 16 of the Complainant's demands for travel time and travel allowance, super seniority, jury duty, and pay on day of inquiry. Having agreed that these were the only open items, the Complainant then proposed its monetary demands for a collective agreement. Those demands were as follows:

<u>Classification</u>	<u>Rate</u>
Fotomates	\$4.00 per hour
Senior Fotomates	\$4.25 per hour
Area Trainers	\$4.50 per hour

No proposals or demands were made for route drivers and maintenance employees.

In addition, the Complainant advised that they were holding to their proposed benefits as set out in their original proposals for a collective agreement.

This flurry of activity was due, it appears, to the fact that before the October 12, 1979 meeting the complainant had set a strike deadline of October 22, 1979. This strike deadline was therefore, set before the complainant had made any monetary proposal and on the basis of Mills' testimony it appears that he was really not prepared to make the proposal that he did. He admitted he quickly drafted a monetary proposal after McCormack had asked for his position and the proposal amounted to a wage increase of approximately 45 percent.

14. Mills testified that he had "hoped" McCormack would reply to his monetary proposal on the Monday or Tuesday of the following week, but that he never heard back from McCormack prior to the commencement of the strike on October 22. He admitted that McCormack had advised him on October 12 of the respondent's objection to the issuance of the "No Board Report" for most of the locations and that he had not tried to contact McCormack prior to the strike to determine why he had not yet replied. The Ministry of Labour, over the signature of Paul Hess, Director of Legal Services, dismissed the respondent's objection to the issuance of the "No Board Report" by letter dated October 19, 1979. The evidence reveals that there were no more meetings between the parties before this complaint was filed on December 14, 1979. Mills explained this delay in filing and the intervening absence of negotiations on the basis that the complainant was waiting for the issuance of a decision of this Board in *Radio Shack*, [1979] OLRB Rep. Dec.1220 issued on December 5, 1979. He further testified that he was preoccupied with the establishment of picket lines at the many locations affected by the bargaining. We would also record that prior to this complaint, the complainant had filed three other unfair labour practice complaints against the respondent. Two of the complaints were withdrawn (Board File Nos. 2033-78-U

and 1351-79-U) and the third was dismissed by a unanimous decision of the Board dated January 15, 1980.

15. The hearing of this matter was originally scheduled for January 24, 1980. However, the respondent sent the following letter to the Board dated January 21, 1980 and, on the agreement of the parties, the case was adjourned pending further negotiations.

As the Board is no doubt aware, a complete collective agreement has been negotiated between Fotomat Canada Limited and the United Steelworkers of America with the exception of certain language and monetary issues which are known to the parties.

In an attempt to set the record straight and to avoid any misunderstanding about our Company's position on collective bargaining with the United Steelworkers of America, the following undertaking is given – namely – our Company undertakes to meet with the United Steelworkers of America and by a process of collective bargaining to bargain in good faith and make every reasonable effort to conclude a collective agreement. Furthermore, our Company hereby agrees to have a mediator assist the parties in achieving a collective agreement.

16. The parties then met on January 31, February 21 and February 25, 1980 with the assistance of two mediators. Progress was made on January 31 and Mills testified that by February 25, 1980 the parties were left with only two items, the respondent's proposed Article 3.01 and the Complainant's proposed Article 6.01 reproduced above. Mills later testified that Article 3.01 was not really in issue. Article 3.01 provided:

3.01 There will be no discrimination, intimidation, restraint or coercion exercised or practiced by the Company or the Union or any of its representatives with respect to any employee because of the employee's membership or non-membership in the Union.

According to Mills, when the parties' positions became this close von Veh told him he had to seek instructions from a representative of the parent company who was at that time skiing in Sun Valley and could not be reached. Mills conveyed his concern about von Veh's inability to convey his clients final position by letter dated February 29, 1980.

We were advised at the conclusion of our lengthy meeting on Monday, February 25, 1980, that your American principal, Mr. John Lackland, was in Sun Valley and could not be reached for the purpose of providing you with instructions on the outstanding matters in dispute.

You therefore withdrew from the meeting at that point. We regard this as entirely inconsistent with the position taken by Mr. von Veh that he had complete authority to conclude a collective agreement on that day.

We now understand that Mr. von Veh departed for two weeks vacation in Hawaii on Tuesday, February 26th.

In view of the long delays in this matter, we require that you provide us with a response or our last offer to you no later than noon on Monday, March 3rd, 1980. I would of course be prepared to discuss this matter with you.

The positions of the parties at this time were subsequently set out in a reply to Mills dated March 3, 1980 over the signature of von Veh together with an attachment recording the respondent's position as of that date. The letter rejecting the union's position of February 25 and the attachment read:

We are in receipt of your correspondence dated February 29, 1980 and wish to clarify a number of points that are raised therein.

Initially, it is pointed out that I did not have "complete authority to conclude a collective agreement on that day". Such a position was never advanced by either myself or Mr. McCormack and in fact the events of Monday, February 25, 1980 clearly indicated the contrary, namely, that instructions were sought on a continuing basis from a senior officer of the client.

We also wish to confirm the events of the 25th, in particular the events surrounding the most recent offer of the Company made to the Union late that afternoon. The most recent position of the Company (photocopy attached hereto) was submitted to the Union, and I was advised by you that the offer would be acceptable on condition that the Company's proposed Article 3.01 be withdrawn and the Union's proposed Article 6.01 be agreed upon. This advice given to the Company's negotiators was subsequently confirmed by Mr. Speranzini. I thereupon advised you and Mr. Speranzini that in view of the conditional acceptance of the Company offer by the Union, instructions would have to be sought from senior Company officers, more particularly Mr. John Lackland. In view of Mr. Lackland's unavailability on that day an adjournment was sought in order to receive instructions on the conditions imposed by you. Both the Union and Mr. Speranzini were advised to this effect.

I wish to now advise you that we have had an opportunity to confer with Mr. Lackland. It is our client's position that the conditions which were imposed by the Union upon the acceptance of the most recent Company offer are not acceptable to our client.

We have further been instructed by our client to seek a further meeting with you in order to continue collective bargaining negotiations in an effort to attempt to resolve the dispute between the parties.

Fotomat Canada Limited Feb 25.80

Company Position on Open Items

1.) Compensation(i) Fotomates – Base Rate \$3.00

1st year	—	.27
2nd year	—	.29
3rd year	—	.32

(ii) Senior Fotomates
(In Store Trainees) – Base Rate \$3.20

1st year	—	.29
2nd year	—	.31
3rd year	—	.34

(iii) Area Trainees – Base Rate \$3.40

1st year	—	.30
2nd year	—	.33
3rd year	—	.36

Note (1) – The above rates reflect a 9% increase in each year of the proposed term of the agreement.

Note (2) – Any employees in these classifications earning more than these rates are to be red circled at the higher rates and will stay at such higher rates until the negotiated rates “catch up”.

2.) No retroactivity

3.) No change in Article 3.01, 6.01(U), and 7.07

4.) The 9% proposed compensation could be otherwise allocated by the Union, in whole or in part.

Mills testified that after March 5, 1970 he did not ask for another meeting because he thought “everything had been exhausted.” He said that at that point the complainant “gave up” on the negotiations and decided to pursue “the political route.” He testified that many of the employees on strike participated in lobbying for a legislative change which would make the checkoff of union dues mandatory in a first collective agreement. He also admitted on cross-examination that there was political advantage to the complainant in having the strike continue during its efforts for legislative reform. Bill 89 was introduced to the Legislative Assembly on June 3, 1980. With surprising speed, it received third reading and royal assent on June 12 and 17, 1980, respectively. The principal provision of the Bill affecting this dispute provides:

36a(1). . . where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a

provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

17. Mills testified that on June 17, 1980 he telephoned mediator, Jack Speranzini, to arrange a meeting with the respondent and shortly thereafter on the same day he received the following hand delivered letter over the signature of Steven J. McCormack.

We have been instructed by our client to advise you that in view of your failing to have responded to our letter of March 5, 1980, and the significant period of time since our last meeting, our client hereby withdraws all monetary provisions of the Collective Agreement which previously were proposed to the Union.

These provisions are more specifically outlined in the Company Proposals for a Collective Agreement and include:

- Article 14 — Hours of Work and Overtime
- Article 15 — Vacations with Pay
- Article 16 — Statutory Holidays
- Article 18 — Bereavement Pay
- Article 19 — Reporting Allowance
- Article 20 — Call Back Pay – Early Reporting Pay
- Article 22 — Classifications and Rates of Pay (as more specifically outlined on the Company's most recent position dated February 25, 1980)
 - Jury Duty
 - Floaters

Our client further instructed us to advise you that it will continue to be available for collective bargaining negotiations in an effort to attempt to resolve the dispute between the parties.

Mills testified that since the passage of Bill 89 and following the respondent's letter of June 17, 1980 the complainant has not attempted to have collective bargaining discussions with the respondent. The following correspondence between the respondent and striking employees was also introduced into evidence.

October 24th, 1979

TO ALL OUR EMPLOYEES:

As you may know, during the past month, your Company has been meeting with the Steelworker's Union, to try to arrive at a collective labour agreement which will govern your terms and conditions of employment. Unfortunately, all of the terms could not be worked out and the Union decided you should go on strike.

We recognize your right to strike, but want you to know that your

Company wants you to come to work *and that you have every right to return to work*. We know that a lot of you want to come to work but are afraid of what might happen if you do. Let me personally assure you on behalf of your Company that if you would like to come to work, your Company will take every step possible to ensure that you enjoy the same working conditions as you enjoyed before and that any problems which may arise as a result of your returning to work will be dealt with very quickly in order to ensure a peaceful and safe work-place.

Keeping in mind that in a strike, nobody wins, and the longer the strike continues, the less likelihood that we will keep all of our customers – loss of customers means loss of work and consequently, fewer jobs, we would suggest that you ask yourself:

- do I really want this strike?
- for what reason am I on strike?
- is this strike best for me and my family?

If you would like to come to work, please call your supervisor at the Area Office, telephone 298-2209, call collect if necessary, and we will make the necessary arrangements.

December 6th, 1979.

TO ALL OUR EMPLOYEES:

As you are aware, certain benefits to which you contributed were available during your employment with Fotomat Canada Limited. During your absence, your Company has been making certain payments on your behalf to cover the expense of your dental plan and in addition, the coverage provided by the Ontario Health Insurance Plan (OHIP). Unfortunately, your Company can no longer carry these benefits during your absence from employment. Accordingly, we must advise you that effective December 13th, 1979, these payments will no longer be made and the coverage under these plans will be your own responsibility.

Should you wish to make your own payments through your Company, we would be more than pleased to hear from you. As we indicated to you in our last letter, if you would like to return to work, you have every right to do so and your Company would appreciate very much your support during these times.

The following correspondence, apparently sent only to strike replacement employees, was also introduced into evidence.

February 21, 1980

As you are no doubt aware, the United Steelworkers of America started a legal strike against our Company on October 22 and December 10, 1979. This strike is continuing as of the present time.

There have been numerous acts of vandalism directed towards the Company and many of our employees have been subjected to abusive language and acts of intimidation and harassment while the strike has continued.

We sincerely regret that such activities have occurred. We have also asked officials of the Steelworkers to refrain from such activities but up to now there has not been any co-operation in this regard.

Under the laws of our province the Company and the union must bargain in good faith, – it is the Company's belief that it has done so and it is our intention to continue doing so. Striking employees and representatives of the union have advised some of you that you will lose your jobs with the Company and that they will be back at work in the near future. We wish to assure you that it is the Company's position that your jobs are secure and that *no one* is authorized to advise you differently. In other words, please be assured that you will not be replaced by a striking employee. You should also be aware that under the laws of Ontario, a company is entitled to continue operating during a legal strike, just like a striking employee is entitled to seek employment elsewhere while a strike is in progress. Don't be misled by irresponsible statements by strikers which may tend to cause some doubt in your mind as to what the law actually states.

Your continuing assistance is appreciated. If you have any problems with your job or if you are intimidated or harassed in any way, please contact your supervisor immediately. Your supervisor and I will assist you in whatever way possible.

March 26, 1980

A number of our employees have told us that over the past two weeks, they have been approached by striking employees and representatives of the Steelworkers Union and have been told various things concerning the status of our present labour dispute. The purpose of this letter is to advise you that a number of the matters raised by these individuals are misleading and irresponsible.

Firstly, the letter dated February 21, 1980 which you received was not illegal, although some of these people would lead you to believe that such was the case. Secondly, we wish to assure you that it is your Company's position that your jobs are secure and that no one is authorized to advise you differently. It is *not* your Company's intention to replace you or move you to a different store.

As you are already aware, under the laws of our Province, your Company and the union must bargain in good faith and it is our belief that your Company has done so and intends to continue doing so. In addition, under our laws, your Company is entitled to continue operating during a

legal strike, just like a striking employee is entitled to seek employment elsewhere while a strike is in progress.

Don't be misled by irresponsible statements made by strikers or union representatives which may tend to cause some doubt in your mind as to what the law actually states. We have stood behind you all the way in the past and will continue to do so in the event you are harassed or pressured in any way.

June 27, 1980

Over the past few weeks a number of our employees have told us that they have been approached by striking employees and representatives of the United Steelworkers of America, and have been told a variety of misleading things including that a number of our employees will be out of work in the near future if striking employees return to work. It may be of interest to all of our employees that not one striking employee has requested to continue employment with Fotomat as required by Section 64 of *The Labour Relations Act* (see page 35 of enclosed Guide).

Initially, we wish to assure you that it is your Company's position that your job is secure and that no one is authorized to advise you differently. It is *not* your Company's intention to replace you.

A number of our employees have also asked us about their rights in connection with the labour laws of Ontario. In order to assist you in understanding what the laws of Ontario are, we are enclosing with this letter a copy of "A Guide to the Ontario Labour Relations Act". This publication has been prepared by the Government of Ontario and sets out in an informal fashion the effect of the labour laws of our Province, subject to certain recent amendments which are not reflected in the Guide.

We wish to reiterate that you should not be misled by irresponsible statements made by strikers or Union representatives which may tend to cast some doubt in your mind as to what the law actually is or where you stand as a Fotomat employee. If you have any problems with your job or if you are harassed or pressured in any way, please contact your supervisor immediately. Your supervisor and I will assist you in whatever way possible.

18. John Lackland, Vice President, General Counsel and Secretary of Fotomat Corporation of Wilton, Connecticut testified that Fotomat Corporation is the parent of Fotomat Canada Limited and Lackland sits on the subsidiary's Board of Directors. He is also responsible for the labour relations and litigation for the parent and all of its subsidiaries. He testified that he has given instructions to von Veh and McCormack throughout the negotiations and was kept apprised of the progress of the negotiations both by them and his Canadian operating people. He said that on February 25, 1980 he could not have been reached by von Veh but that, subsequently, he was advised on the content of negotiations for that day

and he instructed von Veh to write the letter that he did, dated March 3, 1980. He testified that the respondent could not agree to the complainant's Article 6.01. In examination in chief he testified that the respondent was not an old company; that it employed many part-time employees; and it experienced a very high monthly turnover (10%). It was the respondent's view, he said, that this type of employee is not interested in having something deducted from his pay cheque, particularly when the employee might not be with the respondent for very long. He further testified that the Canadian operations had lost money for several years and that in 1979 the parent company had experienced its first overall loss in some years. He said that prior to sending the respondent's letter of June 17, 1980, the parent had obtained its final figures on the 1979 financial year. Not knowing what would be the "aftermath" of this poor financial year, it was decided that it should consider withdrawing its financial proposal in the Canadian negotiations to maintain flexibility. According to Lackland, there was a meeting between von Veh, McCormack, representatives of the parent, and the persons in charge of the Canadian operations after which the offer was withdrawn. Lackland did not attend this meeting and no one who did attend testified before the Board either to confirm its occurrence or to describe its content.

19. Lackland testified that as early as June of 1979 von Veh had advised him of the possibility of legislation like Bill 89. He further admitted to being told in June 1980 that Bill 89 had been introduced but he denied that McCormack's letter of June 17, 1980 had anything to do with the legislation. On cross-examination, Lackland testified that neither the parent nor any of its subsidiaries is party to a collective agreement. Also filed with the Board was a decision of the National Labor Relations Board dated October 19, 1977 finding that Fotomat Corporation had violated section 8(a)(5) of the *National Labor Relations Act* in connection with a certificate pertaining to employees in Cleveland and vicinity. He testified that before making its initial proposals no financial calculations had been made to cost out provisions such as bereavement leave, reporting allowance, call-in pay, statutory holiday pay, vacation pay, jury duty, etc. He said, on cross-examination, that he was not dissatisfied that a collective agreement had not been reached by October 1979; that he felt comfortable about where the parties were in negotiations at that time; and that he would prefer to operate without a trade union. In his view, the "hang-up" issue was union security. He testified that von Veh did not have authority to agree to wages on February 25, 1980 and that the respondent had decided against moving on the union security issue. He further said that the Rand Formula, even if proposed by the complainant, would not have been acceptable. He said that this position was based on the respondent's perception of its employees' concern over the size of their pay cheques. He further testified that he did not think many of the employees actually went on strike or, at least, remained on strike. He agreed that, with the extent of employee turnover, the complainant trade union could not survive without the kind of union security provision reproduced above or at least without the Rand Formula and that the issue was therefore critical to the union. However, he expressed the belief that with employees moving "in and out", they did not care about a trade union and had absolutely no interest in union affiliation in this kind of situation. Lackland also testified that, personally, he did not think the complainant was going to assist the type of employees who work for the respondent, but that the respondent has always been prepared to bargain with the complainant "within the law" and "if that ends up in a contract it ends up in a contract."

20. The parent company's financial year end is January 31. Lackland agreed that the respondent had its monthly figures (and all "last year and last month" comparisons) for January when it made its initial wage proposal. The actual report of the parent's auditors is

dated April 2, 1980. The annual meeting of the parent was held May 29, 1980 in San Diego, California. Lackland testified that the respondent's financial operations are closely monitored. Monthly and annual reports are prepared by operating group (i.e. camera stores, video, kiosks) and that individual stores or kiosks are also monitored although he would not view this material regularly. However, since the commencement of the strike each kiosk has been monitored. He said that at the commencement of the strike there was a "dip" in sales followed by a rapid climb in sales and business is now getting better not worse. The upturn in sales, he said, occurred within a few days of the commencement of the strike. Thus, while the Canadian operations have lost money over the years, the level of such loss did not change significantly with the advent of the strike.

21. He explained the respondent's change in position in June by reference to the parent's loss – its first such loss in many years – and the annual meeting of shareholders. He said he believed that this situation required the respondent to "remain flexible" and he also made reference to the losses sustained by the respondent as a result of vandalism. However, he admitted that vandalism was a problem with or without a strike and that losses due to vandalism were not a significant problem. The Board was presented with no quantification of the respondent's losses due to the strike or to strike related activity. Lackland testified that von Veh called him in San Diego at the end of May or early June. He said they discussed the absence of any response to their March 3rd letter; the financial situation of the respondent; and whether their position should continue to "be out there." They decided, he said, to give serious consideration to withdrawing the offer and that the situation should be reviewed by senior management. He subsequently reviewed the matter with Norman Packard and Dana Hollidy, two vice-presidents of retail stores for the parent, and testified that a meeting of operating people was held in Toronto on June 12th or 13th at which von Veh and McCormack attended. As noted above, Lackland did not attend this meeting and could not remember any discussions with von Veh between this meeting and June 17. He admitted that he was aware of the introduction of Bill 89 before the Ontario Legislative Assembly in early June but that von Veh had merely raised it with him as a mere aside or, in Lackland's words, as an "off-hand comment." He testified that von Veh did not explain how it might affect negotiations. He said he did not know the Bill had received third reading on June 12th and that it received royal assent on June 17. He denied instructing McCormack that the respondent's letter of June 17 be sent before that day or by that day and, indeed, he denied that McCormack had even advised him when the letter was being sent. We observe that McCormack, the author of the letter, did not testify to explain how the letter came to be hand delivered on June 17 nor did he or von Veh testify to corroborate Lackland's testimony on the little attention paid to Bill 89 by the two lawyers. Lackland testified that he did not believe McCormack had been contacted by Speranzini on June 17.

22. The parent company's annual report was introduced into evidence on cross-examination and Lackland was questioned on it. This financial report includes the operation of the respondent on a consolidated basis. Page one reveals an operating loss of \$4,650,000 in contrast to a profit of \$6,299,000 for 1978. However, total revenues for 1979 were reported as \$207,384,000 compared with \$192,474,000 for 1978. Total assets and shareholders' equity were also in substantial excess over the previous year. The "Executive Message" on page 2 begins with the following explanation:

1979 was another difficult year for Fotomat. I was very disappointed in our overall performance. Late that summer we made major changes in

management, organization and marketing philosophy in an attempt to improve earnings. We are now seeing positive changes and I expect Fotomat to increase industry market share during 1980.

Financial Review

Net loss for Fotomat for the year ended January 31, 1980, was \$4,680,000, or \$.57 per share, compared to previous year's earnings of \$6,299,000, or \$.77 per share. Of this loss, \$4,200,000 (\$8,250,000 pretax) resulted from franchisee litigation accruals and reserves. While no one can predict what a court will decide, we believe that we have now adequately provided for the potential exposure in all remaining franchisee litigation.

Other factors contributing to our 1979 year losses were substantially lower than anticipated sales, particularly during the summer holiday season, and a significant planned increase in promotional expense (\$10,200,000 for 1979 versus \$4,000,000 for 1978). Also, we continue to absorb substantial development and start-up costs for our new video program and increases in wage costs (in part caused by legislated minimum wage increases) which were only partially offset by product and service price increases.

It continues on page 3 as follows:

New Bank Agreement

Recently we announced new credit arrangements with our existing banks, Citibank, N.A. and Crocker National Bank, providing for short-term loans aggregating \$25,000,000, of which \$15,000,000 is payable in installments through September 30, 1980, and \$10,000,000 is payable in installments through January 31, 1981. The loans are secured by all real and personal property of Fotomat and its subsidiary companies. These security arrangements have been required by the banks primarily due to their concern over our poor 1979 operating results and uncertainties relating to franchisee litigation. Unless these arrangements are modified to provide additional short-term credit, at least for the spring 1981 period, we must seek other sources for our normal short-term seasonal borrowing needs. We are presently pursuing a number of alternatives.

Litigation

As we have reported for several years, we are engaged in extremely costly litigation with some of our franchisees. We originally believed that the initial adverse judgment in Indianapolis was incorrect. This case was subsequently appealed to the U.S. Supreme Court, but our petition for certiorari was denied and we have paid the approximate \$3,700,000 in damages and costs related thereto. An additional judgment of \$6,500,000 involving franchise stores in Kansas City and St. Louis has been appealed

and our counsel believes there is a sound basis for a reversal or substantial reduction in this judgment. A third case involving franchise stores in Kansas City has recently been settled. The fourth case presently pending in a California state court is expected to go to trial in the fall of 1980. As indicated, we established a total reserve in 1979 of \$8,250,000 for actual or potential losses from franchisee litigation.

Current Outlook

If times were normal I would be enthusiastic and confident of our ability to regain previous years' sales and earnings growth momentum. We have been working very hard to overcome our problems and we have seen a number of positive changes occur. Things are not normal, however. It is possible, even probable, in our view that we are at the beginning of a major recession. Additionally, our leadership in Washington, both at the Executive Branch and Congress, is spending our country toward bankruptcy.

Irrespective of overall economic conditions, we are doing everything possible to regain our profitability during 1980 and we believe we will be successful.

The Canadian operation (the respondent) is mentioned at page 5 and pages 23. The reference at page 5 reads:

Taxes on Income

The operating loss in 1979 resulted in an income tax benefit for the year. The benefit is basically due to applying the operating loss and the current year's investment tax credits against prior years' income and income taxes. The effective rate for taxes on income was 51% in 1978 and 48% in 1977. The difference in those two years resulted from the impact of a higher Canadian operating loss and lower investment tax credits in 1978 than in 1977.

Net Income (Loss)

The net loss for the 1979 year is well below the net income for the 1978 year. The primary cause of this decline is the effect of the provision for franchisee litigation. Additionally, costs associated with increased promotional expenses, the increased minimum wage, the introduction of video products, higher financing costs and the upgrading of our photo-finishing quality, combined with lower than anticipated sales levels, contributed to the decline.

The Canadian net loss for 1979 was \$1,786,000 compared to a \$1,295,000 loss in 1978. Canadian sales were adversely affected by industry conditions as well as a labor stoppage in the fall of 1979.

ARGUMENT

23. On behalf of the complainant it was submitted that the respondent's actions in June amounted to a patently unlawful attempt to avoid a collective agreement and demonstrated that this employer has never intended to enter into a collective agreement with the complainant trade union. Counsel submitted that, assuming lawful conduct, a collective agreement would have been consummated by February 25, 1980 at the latest. Counsel further submitted that but for the respondent's unlawful motive a collective agreement would have been entered into within six months of the commencement of the strike and he argued that it is fair to assume the striking employees would have returned to their jobs on the settlement of the dispute. He further contended that the actions of the respondent and particularly its letters to strike replacement employees demonstrated an unlawful intention not to re-employ striking employees and that this intention is clearly continuing. Accordingly, the complainant emphasized that this Board must reinstate all striking employees regardless of whether such reinstatements displaced employees hired after the commencement of the strike in addition to all the other relief set out at the beginning of this decision.

24. Counsel for the respondent submitted that while the negotiations may reflect "bargaining sloppiness" on both sides, it did not demonstrate any bad faith on the part of the respondent. He emphasized that there was a complete absence of the unlawful conduct surrounding the *Radio Shack* case, *supra*; indeed, there had not been one previous violation of the statute established against the respondent. He emphasized that this was a first agreement situation requiring the negotiation of an entire collective bargaining relationship. He further stressed that the complainant exhibited the same resistance to the union security issue as the respondent. Moreover, in February, he contended, Mills never revealed the complainant's final position on this issue (i.e. Rand Formula). He emphasized that the respondent had presented the person behind the corporate decision-making in June to avoid the drawing of inferences against it that had been made in *Radio Shack*, *supra*, and to demonstrate that Bill 89 played no role in the respondent's actions taken in June 1980. It was also submitted that the complainant should be restricted to the remedies requested in its initial complaint and letter of June 25, 1980 and that at no time has the respondent refused to re-employ striking employees. It was submitted that to direct their return would be contrary to the evidence and would be imposing a term of a collective agreement on the respondent contrary to section 64 of *The Labour Relations Act* and contrary to the Board's remedial powers. On the issue of monetary relief, it was submitted that the complainant bears much of the responsibility for the delay experienced in the negotiations and, thus, for any resulting loss. Finally, it was argued that the respondent was entitled to re-evaluate its economic position and adjust its negotiating posture as it did in June 1980.

DECISION

25. In *De Vilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49 the Board observed that the bargaining duty found in section 14 of *The Labour Relations Act* has two broad purposes when applied to an employer. The first being the employer's duty to recognize the duly designated bargaining agent of his employees; the second being the obligation to engage in all reasonable efforts to arrive at a collective bargaining agreement. Bargaining designed to undermine the trade union and to avoid a continuing collective bargaining relationship is the subject matter of the first purpose. See for example *Kidd Brothers Produce Ltd.*, [1976] Can LRBR 304 (BCLRB) at 313. Bargaining conduct which frustrates meaningful collective

bargaining, but not to the point of evidencing an intention to escape that process, is the focus of the second aspect of section 14. See *Canadian Industries Ltd.*, [1976] OLRB Rep. May 199. However, examples of both types of misconduct frequently arise in the same case and when this is so, the totality of conduct may reveal a basic overall desire to avoid collective bargaining. See for example *Radio Shack, supra*, and *De Vilbiss (Canada) Limited, supra*. Over time, the cases have provided substantial flesh to these “bare bones” purposes. Indeed this case brings into play many of the ancillary principles that have evolved since 1975. For instance: Has the respondent engaged in “hard bargaining” or “surface bargaining?” Did it evidence bad faith by “reneging” on its earlier financial proposal or was it simply reacting to its financial position on the context of a longstanding strike that it was weathering? Has it engaged in reasonable efforts throughout? But before these issues are examined a few of the more fundamental premises of the legislation merit review.

26. In *Radio Shack, supra*, the Board began its opinion with a review of a certified trade union’s exclusive authority to represent bargaining unit employees and an employer’s correlative duty to recognize the trade union’s status in this respect. In this matter, the Board wrote:

64. ... Thus, while it may be tempting for some employers to conduct bargaining with a view to fostering dissension in a bargaining unit by attempting to protect those employees who initially opposed the trade union, it is improper and in violation of the Act to do so. Such conduct interferes with the rightful choice made by the majority of the employees in the bargaining unit, and simply feeds the anxiety of those employees who, for whatever reason, had earlier doubts about the need for or viability of collective bargaining in their workplace.

65. Bargaining with the obvious view of creating and fostering dissension with a bargaining unit, is also a failure to abide by the requirements of section 14 which obligates trade unions and employers alike to “bargain in good faith and make every reasonable effort to make a collective agreement.” On numerous occasions this Board has said that the bargaining duty fortifies the employer’s obligation to recognize the duly certified bargaining agent of its employees. See generally *De Vilbiss (Canada) Limited, supra*. This means that employer conduct during the bargaining process aimed at undermining the credibility of a trade union in the eyes of the employees not only violates sections 56, 58, and 61, it will also amount to a failure to negotiate in good faith. Section 14 demands that both parties have the common intention of signing a collective agreement provided that they can reach agreement on its terms.

However, the Board went to to note that the application of this legal framework was often difficult in section 14 cases because a party is not obligated to agree or to make concessions. The duty to bargain in good faith and make every reasonable effort to make a collective agreement must be applied in the practical context of collective bargaining. However unpleasant the fact, collective bargaining is inevitably a power relationship. The legislation assumes that the resolution of differences between union and management rests on the balance of the relative bargaining power of the two parties. If bargaining power is defined as the ability to secure another’s agreement on one’s own terms, there is nothing in itself unlawful about

either an employer or a trade union wanting its demands met and bargaining to achieve this end. The result may be perceived as unfair, unnecessary, and selfish, but the Ontario Labour Relations Board has not been given the role of interest arbitrator. See *Ottawa Journal*, [1977] OLRB Rep. June 309 at p. 323, para. 57. The Board has, however, said it will scrutinize the first contract relationships that come before it to sort out hard bargaining from unlawful conduct. An employer cannot use his raw bargaining power for the objective of operating without a trade union. On the other hand, no newly certified bargaining agent can afford to lose sight of the fact that collective bargaining remains a power struggle. See *Goldraft Printers*, [1980] OLRB Rep. April 448 at p. 456, para. 26.

27. The Board has also said that it will assess the content of bargaining postures in making judgments under section 14 (*Goldraft Printers*, *supra*, para. 20), but this assessment too must be made against the reality of collective bargaining outlined above. Where a trade union impugns an employer's position on one particular provision or on its tough overall posture at the bargaining table and this alone, the Board has to be as careful to avoid being used by that trade union to supplement its bargaining power as we must be cautious to ensure that the hard bargaining does not have as its purpose, the destruction of the trade union. While it may be that a bargaining agent has its "heart set" on a particular provision as a matter of principle, it must still have the bargaining power to achieve this end. Moreover, tactical errors can have a dramatic effect on a party's bargaining power or lack thereof and, in the words of a relevant fairy tale, this Board cannot be expected "to put all of the pieces back together again." See *Ottawa Journal*, *supra*, para. 59. Complainants must realize that section 14 allegations will be considered in the light of the conduct of both parties and the remedies requested must bear a direct relationship to the breach established as a matter of causation. The Board must be particularly sensitive to the reality of collective bargaining in prolonged strike bound negotiations where interpersonal conflict can become quite embittered and where the temptation to turn to the Labour Board to supplement a party's bargaining power may be great. See *Ottawa Journal*, *supra*. It has long been recognized that the content of the bargaining duty may change as a bargaining impasse continues. Strikes can be lost as well as won. See *New Method Laundry and Dry Cleaners* (1957), 57 CLLC ¶18,059.

28. We have already noted that the instant case lacks the surrounding unlawful conduct evidenced by earlier Board decisions as existed in *Radio Shack*. The certifications would appear to have been without unlawful incident. While three complaints were filed with the Board prior to the instant matter, only one was adjudicated and it was dismissed by a unanimous Board decision. This being the case, the complainant's case lacks much of the contextual support that has persuaded the Board in other cases to draw inferences about the unlawful intention of a respondent when in doubt.

29. We now turn to the bargaining conduct and other matters subject to this complaint. Before February 25th, the complainant contested the delay in bargaining and the ever changing identity of the respondent's representatives. It also complained that it had to make all the concessions and that the respondent engaged in "surface bargaining." We accept that the repeated cancellation (and abbreviation) of meetings by von Veh; the sending of an articling student without a negotiating mandate and without notice to the complainant; and, finally, the substitution of another solicitor in September 1979 was inconsistent with the respondent's duty to make every reasonable effort to make a collective agreement. An employer must make himself reasonably available to bargain and if he selects a representative for bargaining purposes who is in fact too busy to take on the assignment, he puts himself in

jeopardy of violating section 14. See *Insulating Fabricators Inc.* NLRB (1963), 54 LRRM 1246; enforced (1964), 57 LRRM 2606 (CA-4). The pattern of conduct of the respondent in July and August of 1979 does not pass the standard of reasonableness on the evidence before the Board. Negotiations, particularly first contract negotiations, must be pursued with reasonable diligence. The unilateral and frequent cancellation and abbreviation of the bargaining sessions was not consistent with the reasonable efforts required by section 14. Von Veh did not testify and explain his conduct, leaving only Mills' evidence before us with respect to this stage of the negotiations. However, we are of the view that the respondent's conduct in the summer of 1979 is not, in the circumstances of this case, relevant to a complaint filed in December and actively pursued in June of 1980, particularly where the complainant did not protest the delay in writing and engaged in a form of self help by expediting the issuance of a "No Board Report." Once Steve McCormack took over the negotiations for the respondent the evidence also reveals that significant progress was made whether or not Mills thought the complainant was making all the concessions. A review of the provisions agreed to suggests this was not entirely the case, but even if it was, it is a result which is not inconsistent with lawful collective bargaining negotiations. Making all the concessions may simply reflect Mills' assessment of his own bargaining power in the circumstances. The bargaining units are small and spread across southern Ontario. Most of the employees are paid at or near the minimum wage and there would appear to be a high monthly turnover of personnel. Indeed, such an assessment by Mills would not have been unreasonable in the light of Lackland's testimony that the respondent is effectively operating despite the strike and that sales are climbing. We are satisfied that McCormack's involvement cured the earlier problems with the respondent's availability.

30. When dissatisfied with the progress in July and August, the complainant, requested the issuance of a "No Board" report. We are somewhat surprised that even when bargaining began to show some progress in September, the complainant set a mid-October strike date and met this commitment despite the absence of any real dialogue on the issue of wages. In fact, Mills failed to inquire why the respondent had not got back to him on the issue of wages after their October 12th meeting, although we note that McCormack made no particular effort to avoid the strike either. The strike then commenced and no further meetings were arranged between the parties. The next event was the filing of this complaint in early December with the explanation that the complainant was waiting for the *Radio Shack* decision. It is our opinion, however, that the parties had not narrowed their differences enough by October 12, 1979 to provide any bystander with a meaningful appreciation of their respective positions for the purpose of applying section 14. The complainant trade union had a 45% wage increase demand on the table; a number of articles were outstanding; and there was no meetings between the parties after October 12.

31. This brings us to the meetings of late January and February. Von Veh's letter of March 3, 1980 indicates that at the end of bargaining on February 25, 1980 the respondent was proposing a voluntary check-off provision and the union wanted a compulsory union member/union dues provision. Mills testified that he believed the mediator had communicated to the respondent that the complainant would accept the Rand Formula. Although von Veh's letter indicates that the message may not have got through, earlier in August he had indicated a very rigid position on union security. Moreover, Lackland indicated the Rand Formula would not have been acceptable even if proposed and Mills' failure to reply to the March 3rd letter is consistent with his understanding that Rand was not acceptable to the respondent. Indeed, with the experienced mediators assisting the parties on February 25, it is

unlikely that the Rand Formula would not have been explored if union security was the remaining issue, and von Veh did not testify to explain his letter or understanding at the time. But accepting that the respondent was aware that the Rand Formula was acceptable to the complainant, the fact remains that the final offers of the parties as of February 25, 1980 still conflicted on the issue of union security. Lackland acknowledged that a union security provision was fundamental to the survival of a union in this kind of employment situation, but explained that the respondent's rationale was based on its belief that the type of employee it employed was not interested in having union dues deducted from his pay cheque. The issue before us is one of motive. See generally *Westinghouse Canada Ltd.*, [1978] OLRB Rep. April 577 at p. 600 et seq. Was the respondent rigid in its position on union security because it realized how essential it was to the trade union's survival and that there would be no collective agreement without it – an end it desired? Or was its posture a true reflection of the view that the deduction of union dues would be inconsistent with what its employees would want particularly in light of the monthly employee turnover rate? If this were the only evidence before the Board, the case would be most difficult. The respondent's position is so closely related to what it thinks its employees want that the bargaining posture almost seems to ignore the fact that the complainant trade union is the exclusive bargaining agent for all of the respondent's affected employees. It is for the union to plumb the wishes of these employees and to present their unified position for bargaining in light of its statutory duty of fair representation. On the other hand, an employer must deal with employee morale and have regard to recruitment problems and employee turnover, all of which can be impacted by the results of collective bargaining. However, in the circumstances of this case, the ambiguity of the intent or motive of the respondent in February must be viewed against the totality of the evidence and part of this evidence is a consideration of the respondent's actions in June.

32. The complainant contended that the respondent's actions in June in withdrawing the monetary elements of an outstanding offer constituted bad faith and demonstrated that it had simply been using the union security issue in February to keep the parties apart. The problem of one of the negotiating parties "reneging" on a position previously put forward has arisen in a number of American and Canadian cases. In the case of *Pacific Grinding Wheel* (1975), 220 N.L.R.B. 214 at p. 1389; affirmed (1978), 99 L.R.R.M. 2246 (CA-9) repeatedly lower wage proposals by the company during the course of a strike were held to constitute an unfair labour practice by a three member panel, reviewing a decision of an Administrative Law Judge:-

"After the commencement of the strike, there was a dramatic change in Respondent's bargaining proposals. The first such proposal was by June 25 letter to the Union and, in it, Respondent eliminated several substantive terms which had been a part of the previous offer of June 7. Among the items which Respondent wishes to delete was the union-security clause, a provision which had been included in every collective bargaining agreement between the parties since their relationship was established by 1955. A bargaining session was held on July 11 at which no progress was made and, on July 15, Respondent made a new wage proposal which offered an increase in the starting rate for employees, but in all other respects provided for substantially lower rates than had been offered in the June 7 proposal. In fact, in some instances, employees were currently being paid at rates higher than those in the July 15 proposal and this prompted Respondent to offer to "red circle" the rates of those so

affected. On August 19, the parties again met in a negotiating session and on August 20 Respondent offered another new wage proposal which was less than had been offered in the July 15 proposal; it was also significant in that it failed to renew the July 15 offer to “red circle” the rates of those employees who were earning more than the proposed rates would pay. In concluding that Respondent did not engage in overall bad-faith bargaining, the Administrative Law Judge failed to consider the fact that each of Respondent’s proposals after the commencement of the strike was in turn more regressive than its predecessor and that there is no documentary evidence to support Respondent’s claim that its proposals were prompted by economic considerations. While it may be true, as the Administrative Law Judge stated that there is no evidence to show that Respondent’s proposals were “set in concrete,” it hardly demonstrates an approach to bargaining which seeks to reach a mutually satisfactory agreement when, without adequate explanation each proposal is decidedly less favorable than the last one, and nothing in the way of a significant compensatory proposal is offered.”

But in the case of *Randle-Eastern Ambulance Service Inc.* (1978), 99 L.R.R.M. 3377 (CA-5), the Court declined to enforce part of a Board order which had resulted from a finding of bad-faith bargaining in a case where previous positions were withdrawn by the company. In evidence is the Court’s reluctance to allow the doctrine of bad-faith bargaining to “bail out” a party which has engaged in a strike:-

“By April 22, the necessity and advisability of the pre-strike concessions appeared in an entirely different light. The worst case had happened. A strike had occurred and the County had cancelled the Company’s contract. Revenues were way down. The Union had withdrawn its agreement to arbitrate and had shown little sign of relenting on its economic demands. In these circumstances the Company’s withdrawal from the previous proposals was a natural response to the economic pressures it was experiencing. By June 1, the date the Company submitted its new proposals, the situation had changed again. It was by that time apparent that the Company had won the strike, for a substantial number of replacements had been hired, an equal number of strikers had crossed the picket line and returned to work, and the Company had been assured that the County would restore its contract.

We think this case simply a classic example of what collective bargaining is all about. When the Union had the upper hand, the Union negotiators extracted as many concessions as they thought they could. However, the employees decided that the Company could be pushed further and voted to strike instead of to accept the proposed contract. The employees guessed wrong, and the Company balked instead of caving in. As the post-strike bargaining progressed, the balance of power shifted. The economic pressure on the strikers grew and that on the Company lessened. The Company’s June 1 proposals reflected the Company’s new estimate of its strength—an estimate that proved not far wrong, as demonstrated by the Union’s acquiescence in most of the Company’s proposals.”

This case demonstrates how a strike may change a bargaining situation, and how, after a strike, a company may legitimately withdraw previous offers. However, had the Court thought that the company's motives were other than legitimate, the withdrawal of previous positions would have been seen in the same light:-

“Of course, more sinister characterizations of the Company's conduct are possible. But the evidence adduced before the Board, considered as a whole, does not support such a characterization.”

Another case of interest is *Hilton International* (1971), 187 N.L.R.B. 947, case 24 CA-2783 where it was found that the Company's reneging on previous offers represented an attempt to avoid a collective agreement:-

“It is clearly evident from the record that Respondent sought to avoid rather than to reach an agreement with the union. Until October 10, it had firmly adhered to its original wage proposals. However, on October 10, the day the last of the replacement notices were dispatched, Respondent suddenly increased its basic wage offer but only to the extent of a mere 1 cent per hour in both the second and third years of the proposed 3-year contract. And, when the Union accepted the new wage proposal on October 14, the day Gascot and Medina were reinstated, Respondent withdrew the union-shop provision, previously agreed to by it, and announced that the provision would be restored when the Union – certified by the Board only 5 months previous – was able to establish an 80 percent interest in the unit including all replacements. The only justification for the withdrawal appears indirectly in the examination of Martinez by Respondent's counsel. Apparently, Respondent argues that, since the Union had changed its position on the subject of wages, it was at liberty to do the same with respect to a union shop. The argument, if such be the case, stumbles into difficulty on the undisputed fact that there was an agreement as to a union shop but no agreement as to wages. In these circumstances, I am of the opinion and find that Respondent reneged on the union-shop provision because it had no intention of concluding an agreement with the Union. Though not expressly stated, the reason for Respondent's attitude is clear enough. It obviously believed that a contract could be avoided because it had broken the back of the strike by its threats and promises of financial reward, and by the fact that two of the striking employees had offered to return to work. The Union's acceptance of a 1-cent-wage increase, above the original proposal, confirmed this belief as it signalled the demise of the strike effort. Further, by requiring, as a condition to the restoration of the union shop, that the Union establish an 80 percent interest in the interest in the unit including strike replacements who were not likely to be union supporters, Respondent thought it had rid itself of the Union forever. In short, the totality of Respondent's conduct reveals a predetermined plan or strategy opposed to the concept of good-faith bargaining and committed to undermining the Union and subverting the collective-bargaining process. Respondent thereby violated the duty to bargain in good faith as required by Section 8(a)(5) and (1) of the Act and I so find.”

This case is also interesting because the Board found that the strike was prolonged by the company's failure to bargain in good faith, and therefore re-instated the strikers, even though some had been replaced and had no immediate "right" to their jobs back under normal circumstances – an application of the "conversion" doctrine to be discussed below.

33. Ontario cases also make it clear that a sudden unexplained change in the bargaining stance of one of the parties can raise serious doubts about that party's good faith. In *Graphic Centre*, [1976] OLRB Rep. May 221 the Ontario Board said:-

"The tabling of additional demands after a dispute has been defined must, in the absence of compelling evidence which would justify such a course, be construed as a violation of the duty to bargain in good faith."

On the other hand, a previously made offer was withdrawn without a section 14 violation being found in the case of *Toronto Jewellery Manufacturers' Association*, [1979] OLRB Rep. July 719. The complainant union attempted to accept a proposal made over two months prior to the date the membership voted to accept the proposal. The union argued first that a collective agreement was in effect by virtue of the offer and acceptance. In the alternative it was argued that the respondent was in breach of section 14 in not holding to its previous position. In finding that there was no such breach, the Board made the following comments:-

"The complainant, after determining that no further proposal was forthcoming, then resorted to the ultimate form of rejection by embarking on a strike. Is it entitled to expect, after being on strike for up to three weeks, that the offer is still there for the taking? It would seem from the Association's silence that it thinks not, however, that is a matter for the Board to determine. Having regard to the Board's comments in *Pine Ridge*, *supra*, about the collective bargaining process, it would be naive in the extreme for parties to collective bargaining to expect that conditions which prevailed before a strike or lockout to still prevail afterward. That is not to say that both parties might not see it to be in their best interests to agree to pick up bargaining where they left off before a strike or lockout; rather it is to say that neither party is entitled to rely on that being the situation. The Board's jurisprudence on section 14 complaints recognizes this reality when it is dealing with the refusal of one party to resume bargaining during or following a strike or lockout. One of the factors the Board takes into account is whether the party requesting that bargaining be resumed has indicated that it is prepared to make significant concessions from its position prior to the onset of economic sanction. In the absence of such an indication, the Board usually will not find a refusal to resume bargaining to be a section 14 violation. The evidence in this case establishes that the complainant, by going on strike, has taken its best shot at the Association to try and get an improved settlement offer. It has failed and is now trying to salvage the terms which were available before the strike."

34. Unlike in the *Toronto Jewellery* case, *supra*, the respondent before us did not take the position in June that the offer made the previous February had lapsed. Rather, by the wording of its letter of June 17, 1980 and by its conduct before and on that day, it is apparent

that the respondent assumed that its offer had remained outstanding over the intervening time and it sought to “*withdraw*” all the monetary provisions previously proposed. Before the Board, it sought to justify this change in position on the basis of changed economic circumstances as reflected in the parent corporation’s financial performance in 1979; and on its own financial performance in 1979 as compounded by the strike. On all the evidence before us, however, we are not satisfied that this was the respondent’s motive particularly when the existence of Bill 89 is taken into account. When the respondent made its final offer to the complainant on February 25, 1980, the parent corporation and the respondent were fully aware of their 1979 financial performances. Lackland’s testimony reveals a sophisticated monitoring of the financial affairs of the parent corporation including the respondent’s activities. This monitoring was particularly sensitive after the commencement of the strike. It is inconceivable that the detail of the 1979 losses for both the respondent and its parent were unknown to Lackland when he was directing the negotiations in February. It is also relevant that the respondent made no attempt to quantify the kind of savings it could effect by withdrawing its offer. Indeed, the evidence indicates that the respondent has sustained losses in almost all of its years in Canada and that the 1979 and 1980 losses were or are no more significant than in previous years. The respondent made no effort to explain the increased losses in 1979 by reference to the work stoppage engaged in by the complainant’s supporters. Similarly, there is little indication that any savings in the respondent’s negotiations would make an appreciable “dent” in the parent’s losses (now that the respondent has been folded into it) or in the respondent’s 1979 loss. Indeed, the annual report suggests that the parent’s losses reported in 1979 were more the product of unusual litigation costs than of a downtrend in the parent’s performance or market share.

35. On the other hand, the respondent’s withdrawal of its monetary offer is consistent with the timing and effect of Bill 89. Moreover, Lackland’s explanation of his lawyer’s reaction to the bill is not particularly credible. It is not disputed that the legislation was introduced to the Legislative Assembly on June 3rd; it received third reading on June 12th; and it received royal assent on June 17. McCormack’s letter was hand delivered on June 17 after Mills had asked mediator Speranzini to arrange a meeting between the parties. Lackland testified that he began a worry about the offer “hanging out there” towards the end of May or early June and that he spoke to von Veh at that time about the matter. He also admitted that von Veh told him about the introduction of Bill 89 but did so in an “off hand” manner. In our view and in light of the financial data reviewed above, Lackland had no credible explanation for why he suddenly became worried about the offer in early June. Withdrawing the offer in mid-June could be of no benefit to the parent in responding to shareholders at its annual meeting on May 29, 1980 and, as noted above, Lackland knew nothing more about the parent’s overall 1979 performance in May or June than he knew in February. Lackland also admitted that the respondent had recovered quickly from the strike and that strike related costs were not a significant issue. Lackland’s evidence that Bill 89 was only of passing interest to him and his lawyers stretches credulity. The bill spoke to the only issue separating the parties and, in effect, took that matter off the bargaining table. Because the respondent viewed its February proposal as in effect in June, Bill 89, if and when enacted, would have had the effect of creating a consensus between the parties. The bill, therefore, was central to the negotiations between the parties and any experienced labour lawyer would have recognized this fact. We note that neither von Veh nor McCormack testified.

36. The respondent’s withdrawal was not only consistent with the introduction of Bill 89 and its effect, but also with the timing of its passage into law. Seldom has such a significant

labour law reform been passed into law so quickly. No bystander on June 3, 1980 could have predicted that the bill would be given third reading on June 12, 1980 and become law on June 17, 1980. The respondent's actions in causing its June 17th letter to be hand delivered on the very day Bill 89 received royal assent and immediately following the request made of Speranzini by Mills reflects both the respondent's surprise and an attempt by it to react to Bill 89 and its perceived impact on an outstanding comprehensive offer. For all of these reasons, therefore, we must conclude that the respondent withdrew its monetary proposals because it had no intention of concluding a collective agreement. Its actions in this respect constitute a fundamental and flagrant breach of section 14 and, in the circumstances of this case, resolve any ambiguity in the respondent's conduct of February. It is our view that the actions of the respondent in June are tantamount to an admission that its position on union security was primarily aimed at avoiding a collective agreement. We are therefore satisfied, in the light of all of the evidence, that the respondent's position on union security from February to June constituted a violation of section 14.

37. This continuing violation of section 14 having been found, we now turn to the complainant trade union's request that the Board must reinstate the striking employees. Its argument was essentially twofold. It first took the position that the correspondence directed by the respondent to strike replacement employees dated February 21, 1980, March 26, 1980 and June 27, 1980 constituted a refusal or threatened refusal to re-employ striking employees contrary to section 64 and, presumably, contrary to section 14, 56, 58 and 61. Its second argument was that these letters indicated an existing intent to resist the re-employment of the striking employees and that to fail to reinstate them would simply reward the respondent for its unlawful conduct. The relief to which the complainant employees are entitled either in their own right or as beneficiaries of the relief to which the complainant is entitled is a substantial question and one of first impression for the Board. Looking at the alleged threatened refusal to re-employ first, we can begin by examining the provision of section 64(1) and (2). They provide:

(1) Where an employee engaging in a lawful strike makes an unconditional application in writing to his employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection 2, reinstate the employee in his former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee by reason of his exercising or having exercised any rights under this Act.

(2) An employer is not required to reinstate an employee who has made an application to return to work in accordance with subsection 1,

- (a) where the employer no longer has persons engaged in performing work of the same or similar nature to work which the employee performed prior to his cessation of work; or
- (b) where there has been a suspension or discontinuance for cause of an employer's operations, or any part thereof, but, if the employer resumes such operations, the employer shall first reinstate those employees who have made an application under subsection 1.

In *Becker Milk Company Ltd.*, [1977] OLRB Rep. Dec. 797 the Board discussed the provision and observed:

Three conditions must be met to bring that section into effect:

- 1) The employee must be returning to work after engaging in a lawful strike.
- 2) He must make an unconditional written application to return to work.
- 3) The application must be made within six months of the beginning of the strike.

Subject to the exceptions described in subsection (2) of section 64, when these conditions are met “the employer *shall* . . . reinstate the employee in his former employer”. (emphasis added). The effect of that section is to put the striker who returns to work under its protection in a better position than a striker who returns to his employer with only the protection of section 1(2).

The Act is clear that the section 64 applicant is not merely to be reinstated as an employee (because by virtue of section 1(2) he has never lost his status as an employee) but that he must be reinstated *in his former employment*. In other words, “former employment” in this context means his job and unless the exceptions in section 64(2) operate, he is to be put back into his job or into work of a similar nature.

38. It is well established that a striking employee continues to be an employee for purposes of *The Labour Relations Act* regardless of the passage of time provided for in section 64. Section 1(2) of the *Act* provides the statutory basis for this assertion:

(2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

Cartwright J., discussed the effect of this section in *C. P. R. v. Zambri* (The “Royal York Case”) (1962), 34 D.L.R. (2d) 654 at 664:

It is not necessary to decide the exact nature of the relationship of employer and employee the existence of which this subsection preserves, or creates, during the continuance of a strike; two of the main features of the ordinary relationship are absent, the employee is not bound to work and the employer is not bound to pay wages. Whatever the relationship be, it is obvious that if the employer is entitled to terminate it on the sole ground that the employee refuses to work while the strike continues, the subsection is rendered nugatory.

And in that case the employer was found to be in contravention of the Act because it had discharged striking employees (to engage in strike activity being a right under the Act). The protection given to striking employees in the absence of rights under s. 64 was also discussed in *Becker Milk Company Ltd.*, *supra*, where at paragraph 25 the Board stated:

Under *The Labour Relations Act* strikers continue to be employees and they are not to be discriminated against for having exercised their right to strike. When a strike that lasts beyond six months ends in failure there may be existing job vacancies that subsequently arise by the departure of replacements or the creation of new jobs. The qualifications of the former strikers to fill those jobs may in many cases be inferred from their original hiring and past employment. An employer who refuses to give those jobs to returning employees qualified to fill them commits an unfair labour practice to the extent that the refusal amounts to a calculated penalizing of a group of employees for having exercised their lawful right to strike (cf. *Fleetwood Trailer Co.*; *Laidlaw Corp.* (*supra*). The refusal of an employer to put employees back to work in those circumstances is no less a breach of the Act than any attempt to discharge them outright for engaging in the right to strike (cf. *Webster v. Horsfall* 69 CLLC ¶16,050). But, subject to whatever better rights their union can obtain for them, that appears to be the limit of the protection that strikers in that circumstance can expect. An integral feature of the balance of power in collective bargaining is that strikers who return to work without the protection of section 64 of the Act cannot, as a legal right, displace replacements who were hired in their stead.

39. The October 24 and December 6, 1979 letters to striking employees emphasized the right of an employee to return to work. Thus, no striking employee could have had concern for his or her security of employment at that time. Similarly, the respondent's letter to the Registrar of this Board in January and its letter reviewing the positions of the parties in early March gave no indication that either the recall of striking employees as part of a negotiated settlement or their return under section 64 was in issue at those times. It is against this history of negotiations that the denial of Lackland that the respondent has indicated it would not recall striking employees that the three letters must be analyzed. For the first six months of any strike, striking employees have a right to their former jobs on making an unconditional application to this effect with their employer. The only qualifications are where the work is no longer being performed or the employer has ceased operations. The employer cannot refuse the application because another employee is performing the striking employee's job and there are no other vacancies. The striking employee must be returned to his former job even if this results in the layoff, transfer or termination of employment of the replacement employee. When the respondent wrote its first two letters to replacement employees, the six months under section 64 had not yet expired. The February 21 letter assures the replacement employees that their jobs are secure. Would a striking employee reasonably view this letter as a veiled threat that if he made an unconditional application to return to work he would be refused? One test might be to ask whether the respondent could honour both its assurance to replacement employees and its obligation to striking employees under section 64. Because there is no commitment in the February 21 letter that a replacement would not be transferred, it appears that the respondent could honour both the assurance it made and the section 64 right of an applicant striking employee. However, the March 26, 1980 letter contains the

further assurance that a replacement employee will not be moved to a different store and this assurance makes the application of the test more difficult. As a solution the respondent might simply have expanded the number of employees where an applicant striking employee applied to return to a position occupied by a replacement employer, but this solution is not very practical. We have concluded, however, that even if this latter assurance was not possible to honour if a striking employee had applied under section 64, the issuance of the letter cannot be challenged in the circumstances of this case. Firstly, the complainant did not complain about this letter in its particulars of June 25, 1980. Secondly, there is no evidence before the Board that the letter was made available to striking employees by the respondent nor was Lackland cross-examined on the respondent's motive in sending the letter. And thirdly, no striking employee made an unconditional application for reinstatement under section 64. The June 27, 1980, letter was sent after the expiration of the section 64 time period and, by itself, does not violate the Act. As a strike endures, the commitment of an employer to the employees who have helped it resist the strike may become great and, in the usual case, it is for the negotiation process to reconcile this commitment with the interest of striking employees to return immediately to their jobs. Where the trade union is unable to negotiate their immediate return because of the employer's commitment to replacement employees, striking employees who make an unconditional application to return have to be treated, essentially, as employees on layoff and must be considered in filling subsequent vacancies. The rationale to this conclusion is found in the *Becker Milk* case quoted above and in *Fleetwood Trailer Co.* (1967), 66 LRRM 2737. Thus, while the letter of June 27, 1980 may convey the respondent's intention not to recall striking employees immediately to the detriment of strike replacement employees, this is not in itself improper. There is no indication in the letter that striking employees would, on their unconditional application, be refused access to subsequent vacancies.

40. We are therefore left with the complainant's second argument – that to fail to reinstate the striking employees would simply reward the respondent for having brought the complainant “to its knees” by unlawful means. This raises the appropriateness of such a remedy in the circumstances and the related question of whether it is necessary to effectuate the policies of the Act.

41. In many cases coming before the National Labor Relations Board, such as *Laidlaw Corp.* (1968), 68 LRRM 1252, affirmed (1969), 71 LRRM 3054 (CA-7), cert. denied (1970), 73 LRRM 2537 (U.S.S.C.), it has been plain that the employer's unfair labour practices caused the employees to initiate or prolong a strike and in such cases the Board has quite uniformly ordered the employer to reinstate the striking employees to their former positions, discharging if necessary replacements hired during the strike. That Board has, therefore, treated the unfair labour practice striker somewhat more favourably than the economic striker in the sense that the latter employee has no immediate right to reinstatement without a settlement to this effect. See *NLRB v. MacKay Radio and Telegraph Co.* (1938), 304 U.S. 333, 58 S.Ct. 904. This distinction can become very significant where a strike is initiated over bargaining demands but, during the course of the strike, the employer commits unfair labour practices. The employer's unfair labour practices will be held to “convert” the strike if it can be determined that the employer's actions prolonged the strike beyond the date it would have been terminated as only an economic strike. For example, in the *Laidlaw Corp.* case, *supra*, the Board applied the “conversion” doctrine and found that what had begun as an economic strike was converted into an unfair labour practice strike when it was prolonged by the union's vote to protest the employer's outright termination of strikers seeking reinstatement. The Board applied its usual rule that the strikers who were permanently replaced during the economic

phase of the strike were not entitled to immediate reinstatement, while the strikers replaced after the date of conversion were.

42. We do not think that the OLRB needs to adopt all the American trappings of an unfair labour practice strike, but the concept's underlying purpose has considerable relevance to the exercise of this Board's jurisdiction under section 79. Where, for example, employees go on strike and it is subsequently determined that the employer has committed certain basic and flagrant unfair labour practices, their security of employment may become a remedial issue. This may, particularly, be the case where the period under section 64 has lapsed and the only opportunity for immediate reinstatement without a remedial order from the Board is through a negotiated settlement to that effect. If the trade union's capacity to negotiate that result has been put into question or eroded by the employer's unlawful resistance, the failure of the Board to provide for the return to work of striking employees would have the result of rewarding the employer for his unlawful actions. On the other hand, as a strike endures strike replacement employees who have been permanently hired develop an interest in their job which this Board cannot ignore. Their interests should be considered in light of the time and gravity of the employer's unfair labour practice together with any expectations they might have as a result of employer commitments.

43. In the facts at hand, Lackland testified that the respondent had never taken the position that it refused to recall or employ striking employees. Rather, he said that the matter was negotiable and ought to be part of the continuing negotiations. However, the problem with leaving the employment security of the striking employees to the negotiation process is that the complainant's bargaining power to seek their immediate reinstatement has been eroded with the passage of time and respondent's failure to bargain in good faith has contributed in a substantial way to this delay. To let the respondent now place the issue of the reinstatement of the striking employees on the bargaining table would permit it to reap a benefit from its earlier unlawful conduct. We also would note that the immediate recall of striking employees was not in issue between the parties in February and, indeed, was not raised by the respondent in its letter of June 17. We also note that the respondent experiences an employment turnover rate of ten percent a month providing vacancies for any of the strike replacement employees who might be affected by the immediate return to work of the striking employees. In fact, the striking employees have evidenced a commitment to the respondent that is in marked contrast to this turnover rate. Finally, none of the replacement employees could have been hired permanently to replace striking employees until towards the end of April 1980 (i.e. six months after October 22, 1979) and we have found that the respondent's unlawful conduct pre-dates that point in time. Indeed, had a settlement been negotiated in February subject to ratification, striking employees could have made an unconditional application under section 64 pending the ratification and still complied with the section.

ORDER

- (a) Having regard to all of the above circumstances, we have come to the conclusion and so direct that regardless of the outcome of negotiations on the issuance of this order, striking employees should be given the opportunity to make an unconditional application to return to work on or before December 1, 1980 and if such application is made by any striking employee the respondent shall reinstate

the said employee to his former position whether or not a strike replacement employee must be transferred, laid-off or terminated.

- (b) The Board declares that the respondent failed to bargain in good faith and make every reasonable effort to make a collective agreement by withdrawing its monetary proposals by its letter dated June 17, 1980.
- (c) The Board further declares that the respondent failed to bargain in good faith and make every reasonable effort to make a collective agreement in adopting the position that it did on union security on and about February 25, 1980 and March 3, 1980.
- (d) The Board directs the respondent to bargain in good faith and make every reasonable effort to make a collective agreement. To this end, the Board specifically directs the respondent, on the receipt of this decision, to convene forthwith a series of bargaining meetings between itself and the complainant with the assistance of a Ministry of Labour mediator and, at the initial meeting, to resubmit for the complainant's consideration the entire offer made to the complainant on or about February 25, 1980 including the monetary proposals that it unlawfully withdrew on June 17, 1980.
- (e) The respondent is directed to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places at all its places of business where bargaining unit employees are employed in Ontario, including all places where notices to employees are customarily posted and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant trade union to satisfy itself that this posting requirement has been and is being complied with.
- (f) The respondent is directed, at its own expense, to mail a copy of the attached notice marked "Appendix" after being duly signed by the respondent's representative to the residence of each employee in the said bargaining unit forthwith.
- (g) The respondent is further directed to pay to all bargaining unit employees all monetary losses that the complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate a collective agreement due to the unlawful conduct of the respondent, the said damage, if any, running to the date of the first meeting convened by the respondent in accordance with paragraph (d) of the Board's order, together with interest as appropriate.

44. This order reflects the view of the Board that the complainant's current situation is also, to some degree, the natural result of collective bargaining. For this reason, all other relief requested in this matter is dismissed.

DECISION OF BOARD MEMBER F. W. MURRAY:

1. I agree with the Chairman's findings as to the company's breaches of the duty to bargain in good faith and his reasons for making those findings.

2. However, I feel that the union's bargaining strategy, beginning with the request for the appointment of a conciliation officer, was not conducive to achieving an early collective agreement. It applied for conciliation before making any monetary proposals, and then called a strike before receiving the company's reply to those proposals. It did not attempt to bargain during the beginning of the strike, but claimed it was waiting for the *Radio Shack* decision before filing a complaint with the Board. After further negotiations, the company and the union came to an impasse over union security. There was room for both parties to compromise. Rather than attempt to continue to bargain, the union once again left the table to engage in political action. Indeed, the union conceded that it was to its political advantage to continue the strike after the company refused to give in to the union's demand on union security. Furthermore, the union did not consider the effect of section 64 upon the striking employees. Had they done so, the strike may have been settled earlier. I am therefore satisfied that while the company did not intend to reach a collective agreement as of February 25th, 1980, as evidenced by its actions of June 17th, 1980, I am of the opinion that the union shares much of the blame for permitting the strike to start and continue for such a long period of time. Therefore, in my opinion the remedies directed by the Chairman are unjustified in light of the union's conduct.

3. One can only speculate as to why the employees on strike did not invoke section 64 to return to work. They chose instead to maintain their status of striking employees and, as the evidence disclosed, continue their political activity under the applicant's direction, activity they would not be in the same position to continue had they altered their status. The Chairman, by directing the company to offer them employment and to award damages, is rewarding the employees and the union for calling and continuing the strike which was protracted by the union for political gains. The strike was called by the union after the company had begun to bargain in good faith. Thus, in my opinion, a strike would have continued for some time and it can be concluded that it would have continued at least until the political activity was concluded in late May or early June. For these reasons I dissent from the Chairman's award in so far as it directs the company to offer employment to the striking employees and awards the employees damages.

4. I agree with the declarations made by the Chairman, and the directions to meet and bargain in good faith. However, I would simply direct the company to table an offer acceptable to it to the union. In the circumstances, I do not feel that the postings and mailings are necessary or desirable since much of the dissipation of the union's strength is directly attributable to the union's conduct during bargaining.

DECISION OF BOARD MEMBER W. F. RUTHERFORD:

1. The decision of the Chairman accurately sets out the evidence which was presented

to the Board by the parties at the hearing. However, I disagree with some of the inferences which he draws from that evidence.

2. The Chairman and I agree that the conduct of counsel for the company in the early stages of negotiations, where he was either unavailable to meet or else sent an articling student without authority to negotiate, was conduct contrary to section 14 of the Act. One can understand that emergencies may arise which must result in the unavailability of a party's representative. However, the circumstances in this case leads me to the conclusion that the company, through its counsel, was not making reasonable efforts to reach a collective agreement at that time.

3. These deliberate delaying tactics in which the company engaged at the early stages of bargaining toward a first collective agreement set the tone for the balance of the negotiations. I disagree with the Chairman's finding that the subsequent negotiations carried on by Mr. McCormack cured this unlawful conduct. It may well be that the company made concessions over several issues, nevertheless, the totality of the bargaining conduct by the company was, in my view, directed towards frustrating the union's attempts at reaching a collective agreement.

4. The refusal by the company to include a mandatory dues check-off provision in the agreement was an integral part of the company's plan. It conceded on issues which were not that contentious, knowing full well that the union would not be in a position to concede the issue of union security. The company, in its evidence, acknowledged that it was necessary for the union to obtain mandatory dues check-off in order to survive. Although the company put forward an explanation for its position on union security, its conduct in June makes it clear that the company was using that issue as a way of avoiding a collective agreement.

5. In my opinion, had the company bargained in good faith, a collective agreement would have been reached no later than March 3rd, 1980, which agreement would have included a mandatory dues check-off provision. Furthermore, since the agreement would have been reached prior to the expiry of the time within which an application under section 64 could have been made, the striking employees would have been entitled to return to work on or shortly after that date.

6. For these reasons I believe that the remedies which the Chairman has determined are appropriate in this case do not go far enough. Because a collective agreement would have been reached on or before March 3rd, 1980, but for the violation of section 14 of the Act by the company, in addition to the remedies ordered by the Chairman, I would direct the company to reinstate all striking employees to the jobs which they were in prior to the strike with compensation for loss of wages and benefits from March 3rd, 1980, and direct the company to remit the regular union dues to the union from all employees in the unit as of March 3rd, 1980.

The Labour Relations Act

1436

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have issued this notice in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which both the company and the Union had the opportunity to present evidence. The Ontario Labour Relations Board found that we violated the Ontario Labour Relations Act and has ordered us to inform our employees of their rights.

The Act gives all employees these rights:

To organize themselves;

To form, join or help unions to bargain as a group, through a representative of their own choosing;

To act together for collective bargaining;

To refuse to do any and all of these things.

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to bargain collectively with the United Steelworkers of America as the certified bargaining agent representative of all employees for whom this trade union has been certified to represent.

WE WILL make whole all bargaining unit employees who suffered losses by reason of our failure to bargain in good faith as directed by the Board.

WE WILL comply with all other directions of the Ontario Labour Board including:

- (1) the immediate reinstatement to his or her former position of any striking employee who makes an unconditional application to return to work on or before December 1, 1980;
- (2) the immediate convening of a series of bargaining meetings with the United Steelworkers of America and, at the first such meeting, we will resubmit our entire offer made to that trade union on or about February 25, 1980;
- (3) the mailing of a copy of this notice at our own expense to each employee in the bargaining unit.

WE WILL bargain collectively with the United Steelworkers of America as the duly certified collective bargaining representative of our employees in all certified units as directed by the Board and if an understanding is reached, we will sign a contract with the Union.

FOTOMAT CANADA LTD.

Dated: October 24, 1980.

Per: (Authorized Representative)

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

0844-80-R United Plant Guard Workers of America, Local 1962,
Applicant, v. **General Motors of Canada Limited**, Respondent, v. Group
of Employees, Objectors

Certification – Membership Evidence – Objector alleging collector misrepresenting effect of signing cards – Misrepresentations cured at meeting – Single collector – Misrepresentations isolated – Whether membership evidence affected

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and H. Simon.

***APPEARANCES:** Chris G. Parliare and Watson Cook for the applicant; Edward J. McDermott and Pierre Comtois for the respondent; Vincent Vasey, James F. Stacey, Fred Maybee, Gary D. Cooper and Carl Carey for the objectors.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER H. SIMON; October 16, 1980

1. This is an application for certification.

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4. The applicant seeks bargaining rights for some 78 plant guards employed to maintain security at General Motor's South Plant in Oshawa. While the parties agree that the bargaining unit should be restricted to the South Plant, one employee came forward with an objection. James Stacey, a security guard not employed in the proposed bargaining unit but rather in General Motors' North Plant, some three miles away from the South Plant, submitted that plant guards in both plants should be seen as the appropriate unit for the purpose of collective bargaining. The guards in the two plants have the same employer and have in the past been on a common seniority list. However, few, if any, of the established criteria would support the conclusion that the two plants should be made into a single bargaining unit.

5. It appears that there is little, if any, interchange of employees between the two plants except in extraordinary circumstances such as occasional overtime. Given that fact, the geographic distance between the plants, the likelihood that the establishment of a two-plant bargaining unit would unduly interfere with the organization of an otherwise viable bargaining unit, and given the agreement of the employer and the union, the Board finds that all security guards employed by the respondent at its South Plant in the City of Oshawa, in the Regional Municipality of Durham, in the geographic limits of Bloor Street on the north, Philip Murray Avenue on the south, Park Road South on the east and Stevenson Road on the west save and except sergeants and persons above the rank of sergeant, office and clerical employees, students employed during the school vacation period, all persons regularly employed for not more than 24 hours per week and all other employees, constitute a unit of employees of the respondent appropriate for collective bargaining. (*Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7; *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526.)

6. In support of its application, the union filed 70 membership application cards. Applying the Board's 30 day rule there are 78 employees in the bargaining unit and one card filed must be discounted. Prior to the terminal date the Board also received a number of statements of desire filed individually and in groups by employees opposing the application. Only four of

those objections, however, were by employees who had previously joined the union. The slight overlap between the objections and the membership evidence would not, therefore, cause the Board to inquire into the origination or circulation of any of the statements of desire, since they would not be sufficient, even if proved voluntary, to cause the Board to order the taking of a representation vote. One of the petitions, however, charged that a union organizer had obtained membership evidence by falsely misrepresenting that there would be a representation vote. On that basis the objectors submitted that a representation vote should be held. The Board therefore heard evidence in respect of that issue.

7. The membership application cards filed by the union were collected entirely by Mr. P. Dillon, a rank and file employee. The unchallenged representation of the union is that Mr. Dillon could not attend the hearing because of a serious illness which required his hospitalization. The union therefore called 3 other witnesses, including the president of the applicant union and two employees, to give evidence of the conduct of the membership campaign by Mr. Dillon.

8. Only three employees out of a bargaining unit of seventy-eight testified that they were in any way misled or confused by statements made by Mr. Dillon. Mr. Gary Cooper testified that before he signed a union membership card Mr. Dillon told him, in the company of two other employees, that there would be a representation vote on the question of union certification. The evidence also establishes, however, that Mr. Cooper was present at one of two union meetings held on July 27, 1980 attended by forty to fifty of the employees of the bargaining unit when Mr. Watson Cook, the president of the union and an individual experienced in applications for certification, explained that because the membership evidence greatly exceeded fifty-five per cent the prospect was that in all likelihood the union would be granted outright certification by the Board. That statement was made some four days prior to the terminal date, thereby giving ample time to any employee who wished to withdraw his support from the union the opportunity to do so. Cook's statement that there would be no representation vote met with no protest from any employee at the meeting.

9. Mr. Vicent Vasey testified that he was told in a restaurant by Mr. Dillon that there would be a representation vote taken. He admitted however that Mr. Cook was also present and then explained to him that in fact there would not be a representation vote if the union's strength exceeded fifty-five per cent. Given that correction by Mr. Cook, an experienced union official, the Board cannot put great weight on the evidence of Mr. Vasey that he was nevertheless confused, particularly when it was within Mr. Vasey's power to further check out Mr. Dillon's statement if he wished. Moreover, Mr. Vasey could not recall whether Dillon's statement about a vote was made before or after he signed a membership card.

10. The third piece of testimony challenging Mr. Dillon's conduct came from Mr. John Gorman, a plant guard. Mr. Gorman decided, apparently without being approached by Mr. Dillon, that he wished to join the union. On a Sunday, in the company of two other employees he went to Mr. Dillon's house to sign a union membership card. Mr. Dillon did not initiate any discussion of a representation vote. Mr. Gorman's evidence discloses that he asked Dillon whether there would be a vote. In an obviously off-hand reply Dillon responded that there would be no vote "if we get one hundred per cent signed up." The Board is not satisfied that Mr. Gorman could reasonably rely on anything in that comment, made as it was in such an obviously casual way by a rank and file employee.

11. As against these three isolated incidents there is substantial evidence from the union

that Mr. Dillon did not engage in a pattern of misrepresentation among the respondent's employees. Mr. Frank Guypens, a plant guard, and Mr. Cook both testified that they were present when a number of membership cards were collected by Mr. Dillon. Their uncontradicted evidence is that Mr. Dillon did not make any statements to the effect that a representation vote would be held. The evidence of plant guard Ken Wood is to the same effect. Mr. Wood testified that Mr. Dillon told him as he heard Dillon tell other employees over a period of three weeks, that if membership reached between fifty and sixty per cent a vote would not be needed to obtain certification. Significantly, the evidence of Mr. Fred Maybee, an objector, confirms the evidence of the three union witnesses. He was approached by Mr. Dillon on July 24, 1980 and was asked to join the union. According to Mr. Maybee, Mr. Dillon said nothing about a representation vote.

12. In certification proceedings the Board must rely upon the membership evidence filed by the union. Because it is a form of hearsay evidence not disclosed to the employer and not subject to cross-examination the Board holds unions to a high standard of integrity in the quality of the membership evidence submitted. The burden is upon the union to satisfy the Board that each employee has signed the membership card tendered on his behalf and has paid any initiation fee that accompanies the membership application. Where, however, there are allegations that the union or anyone working on its behalf have committed irregularities not going to the validity of the signatures on union cards, the payment of the initiation fee or the truth of the Form 8 declaration concerning the collection of the membership documents, the burden of proof falls upon the party making the allegation. For example, a party alleging that membership evidence was obtained through coercion or intimidation has the burden of coming forward and establishing, on the balance of probabilities, that the conduct alleged in fact occurred.

13. In this case the burden is upon the objectors. The evidence to discharge that burden will necessarily be higher where, as in the instant case, the union has filed membership evidence in excess of seventy-five per cent of the bargaining unit. Because that evidence would, in the normal course, entitle the union to outright certification the Board would naturally require substantial evidence from which it could conclude that it cannot rely upon the membership evidence filed by the union or that it should order a representation vote.

14. The Board has in the past had numerous opportunities to review the standard to be applied in assessing the conduct of a rank and file employee, as opposed to a union official, in the collection of membership evidence, and the consequences that flow from irregularities established in the collection of membership evidence by an employee. In reviewing the standard applicable to an employee-collector the Board commented as follows in *The Kendall Company (Canada)* [1975] OLRB Rep. Aug. 611 at p. 619:

In all cases alleging improper trade union conduct the Board first begins by assessing the nature of the conduct – the test being would it deter the reasonable employee? If the answer to this question is in the affirmative the Board must go on to assess the possible significance of the conduct and in this regard the identities of those persons involved are very important. Where the action impugned is that of a responsible official of the trade union a single indiscretion may cause the Board to conclude that it cannot place reliance on any of the evidence of membership submitted by the union. Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the actual

cards involved may be disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members. (See *Webster Air Equipment Company Ltd.* 58 CLLC ¶18,110; *Walter E. Selck of Canada Ltd.*, [1964] OLRB Rep. June 138; *Linhaven Home for the Aged*, [1962] OLRB Rep. May 66.)

15. Although the foregoing comments were made in the context of allegations of intimidation, we are satisfied that they are equally applicable where fraud or misrepresentation is alleged. In the *Kendall* case the Board exhaustively reviewed the standards to be applied to different types of conduct by employees soliciting union membership. As that decision discloses, the Board has a particular concern with threats to the job security of employees in attempts to gain their support for a union, even when those threats are by a rank and file employee. On the other hand the Board has always sought to maintain a realistic appreciation of the need for free and unfettered conversation between fellow employees. In this regard, absent physical threats or threats to job security, the Board is careful not to place undue weight on a statement made by one employee to another on a subject in which neither of them is an expert, particularly when the recipient of the statement has every opportunity to check the statement's accuracy. (*Green Giant of Canada Limited*, [1973] OLRB Rep. June 376).

16. Threats to job security have, however, been strictly viewed as beyond the bounds of employee free speech. For example, in *Walter E. Selck of Canada Ltd.*, [1964] OLRB Rep. June 138 the union's campaign was under the exclusive direction of a rank and file employee who collected all but three of sixty-two membership cards. In the face of unchallenged evidence that the employee-collector told two employees that they would lose their jobs if they failed to join the union the Board dismissed the application, concluding that it could not, in the face of that established unfair labour practice, rely on any of the membership evidence filed. Where, however, a statement made by one employee to another in the course of a union campaign does not threaten an employee's job security or otherwise disclose an unfair labour practice different considerations apply. The Board is reluctant to hold the rank and file employee to the standard of a trained lawyer, or to impose censorship on the casual conversation that inevitably flows between employees during a union campaign. To do otherwise, in the words of the Board at p. 623 of *Kendall*, "would be oblivious to human nature and result in artificial standards that would adversely affect the rights of all employees under the legislation."

17. That is not to say, however, that a union can escape the consequences of irregular conduct by effectively placing its entire campaign in the hands of a rank and file employee. Where a person who is not a union official is charged with collecting all of the membership evidence and is found responsible for a non-pay (*Slough Estates*, [1965] OLRB Rep. June 173) or a non-sign (*Dominion Stores Limited*, [1964] OLRB Rep. Dec. 447) the Board may conclude that it can rely on none of the membership evidence filed and dismiss the application. Alternatively, in the face of such conduct by a person other than a union official, the Board may conclude that the documentary evidence is "under a cloud that requires the confirmatory evidence of a representation vote." (*Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. Apr. 424.) The same considerations apply when the conduct in question involves threats to employees' job security (see the *Selck* case, *supra*).

18. The Board's reluctance to restrict or limit talk that may flow between fellow employees during a union campaign should not, however, be taken as an indication that the

Board will not scrutinize the statements of rank and file employees, particularly where it is clear that an employee charged with the collection of all the membership evidence has substantially misrepresented to employees the meaning of signing a union membership card. If the evidence establishes that an employee collector has repeatedly obtained membership evidence by telling employees that by signing a card and paying a dollar they are in effect endorsing an application for a vote on the question of union representation, or if the Board cannot be satisfied to what extent such a representation was made, the Board may be unable to place any reliance whatever on the membership evidence filed, or it may seek the confirmatory evidence of a representation vote. In each case, however, the Board must consider the evidence in the particular case before it to make that determination.

19. In the instant case the evidence discloses three isolated instances, during the collection of some seventy union membership cards, in which Mr. Dillon, a rank and file employee with no apparent experience in union organizing, made comments that suggested that a representation vote would take place. These were manifestly the kind of statements which could have been checked out by the employees to whom they were made. In fact in two of the three instances they were corrected by the union's president, Mr. Cook. In the third instance, involving Mr. Gorman, Mr. Dillon made a casual response that if all of the employees were signed up there would be no vote. That off-hand statement, albeit technically true, was obviously not intended to be relied upon as legal advice to Mr. Gorman. It would stretch reality to elevate that exchange to the level of a material misrepresentation that should weaken the union's otherwise overwhelming membership evidence in this case.

20. In this case there is substantial evidence from which to conclude that the two or three occasions Dillon indicated there would be a vote were in fact isolated incidents. While the evidence of both objectors and union adherents may be suspect because of its self-serving nature, the independent testimony of Mr. Maybee, an employee opposing the application is of considerable value. He testified that when Dillon solicited his membership he made no mention of the possibility of a representation vote. That evidence corroborates the testimony of Mr. Woods, Mr. Guypens and Mr. Cook that in the numerous occasions they observed they did not hear Mr. Dillon promise a representation vote as an inducement to obtain membership support. Moreover, the conclusion, on the balance of probabilities that Dillon didn't engage in misrepresentations beyond the instances proved is further corroborated by the reaction, or lack of it, at and after the employee meetings attended by forty to fifty employees, four days prior to the terminal date. At that meeting Mr. Cook clearly explained that there would not be a representation vote. If there had been a significant pattern of repeated promises by Dillon to employees about a representation vote it would not be unreasonable to expect a substantial protest in the form of an outburst of the employees at that meeting or by employee objections at the Board hearing either by personal attendance or through the more anonymous expedient of employee petitions. There was in fact no reaction at all at the employee meeting and nothing came to the Board except the objections of Mr. Cooper, Mr. Vasey and Mr. Gorman, such as as they are. In these circumstances the Board must draw the inference most consistent with the evidence, namely that the incidents involving Cooper, Vasey and Gorman are isolated incidents which would not justify the taking of a representation vote.

21. This case must be distinguished from those in which the Board is faced with instances of irregularities involving employee collectors that stand without additional evidence to satisfy the Board that they were in fact isolated incidents. In those cases the Board may, through natural suspicion, place no reliance on the value of the membership evidence collected by the employee in question. Nor, on the evidence, is this case one where there has been a clear

and widespread communication to employees indicating that a representation vote would be held (see *Carleton University*, [1975] OLRB Rep. Apr. 308). On the basis of the evidence before it the Board merely disregards the cards of Mr. Cooper, Mr. Vasey and Mr. Gorman on the basis that they freely withdrew their support of the union prior to the terminal date. That leaves the applicant with membership strength in excess of seventy per cent.

22. The Board therefore finds that on the basis of all the evidence before it more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 31, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J. A. RONSON:

The dissent of Mr. Ronson will follow.

0572-80-U Brian Eric Dwight, Complainant, v. International Union of Operating Engineers, Local 793, Respondent, v. Operating Engineers Employer Bargaining Agency, Intervener.

Arbitration – Duty of Fair Representation – Section 79 – Whether owner/operator employee in unit – Union enforcing collective agreement under Section 112a – Board issuing consent order barring complainant from receiving work – Whether Section 79 proceeding may affect earlier Section 112a proceedings

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members C. A. Ballentine and J. D. Bell.

APPEARANCES: *R. W. Cosman, D. N. Corbett and R. McCormick for the complainant; A. M. Minsky, M. Zigler and E. Ford for the respondent; S. C. Bernardo for the intervener.*

DECISION OF THE BOARD; October 6, 1980

1. This is a complaint filed under section 79 of *The Labour Relations Act* alleging violations of section 60, 60a, 61, and 136(1) of the Act. At the hearing the complainant advised that he was also alleging a violation of section 38(2) of the Act. The essence of the complainant's allegation is that because he is a dependent contractor he is also an employee within the bargaining unit represented by the respondent trade union and, therefore, the actions taken by the union which resulted in his loss of employment with Ward Crane Rentals Ltd. violate the aforementioned sections of the Act.

2. The respondent union asks the Board to restrict the scope of the complaint to the sections of the Act relied upon prior to the hearing. In any event, the respondent argues, by

way of preliminary motion, that the allegations, as particularized, even if proven, would not establish a violation of the Act. The respondent relying on Rule 46(1), asks the Board to find that no *prima facie* case is made out and to dismiss the complaint without hearing evidence. Rule 46(1) provides:

Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

3. The particulars filed in support of the complaint, which the respondent maintains do not established a *prima facie* violation of the Act, have been filed in two parts. The first pertains to Mr. Dwight's status as a dependent contractor under section 1(1) (ga) of the Act. These are:

- “(1) The complainant worked exclusively for Ward Crane Rentals Ltd. and earned all of his personal income from that company.
- (2) The method in which the complainant was paid for his services more nearly resembles that usually adopted in an employer/employee relationship than it does that adopted when an independent contractor is hired. In particular, the complainant relies on the following facts:
 - (a) the complainant issued bills to customers from a Ward Crane Rentals Ltd. bill book;
 - (b) customers paid Ward Crane Rentals Ltd. and not the complainant;
 - (c) the complainant was paid by Ward Crane Rentals Ltd. directly;
 - (d) the complainant was guaranteed payment 45 days from the end of the month in which his work had been done;
 - (e) any losses which Ward Crane Rentals Ltd. suffered were not passed on to the complainant and any benefits that Ward Crane Rentals Ltd. might receive from early payment were not passed on to the complainant; and
 - (f) Ward Crane Rentals set the rate to be charged to its customers for the services of Mr. Dwight and other independent operators working for that company.
- (3) Licensing arrangements between the complainant and Ward Crane Rentals Ltd. support the inference that an employer/employee relationship was involved. In particular the complainant relies on the following facts:

- (a) Ward Crane Rentals Ltd. arranged for the complainant to receive the necessary licenses;
 - (b) the P.C.V. License was issued to Ward, not to the complainant;
 - (c) Ward paid the application costs for the license while the complainant paid only for the plates that went on his truck; and
 - (d) because of the restrictions attached to the said P.C.V. License, the complainant was not able to use the truck for personal purposes, but only in connection with his work with Ward Crane Rentals Ltd.
- (4) The complainant was engaged in the solicitation of business for Ward Crane Rentals Ltd. and participated in promotional activities such as distributing Ward Crane Rentals Ltd.'s pens, business cards and rate sheets to customers. At no time when working for Ward Crane Rentals Ltd. did he solicit business on his own behalf.
 - (5) The complainant's machine carried the Ward Crane Rentals' logo and sign and Ward Crane Rentals' telephone number. The only reference to the complainant was a small statement printed on the sign of the cab saying that the truck was owned and operated by the complainant.
 - (6) Ward Crane Rentals Ltd. controlled the allocation of work and the complainant received instructions from Ward Crane Rentals on the times and places at which he was to report for work and was not free to disregard these directions if he wished to continue to work for Ward Crane Rentals Ltd.
 - (7) Ward Crane Rentals Ltd. made deductions from the payment it gave to the complainant pursuant to an insurance policy which the company had set up for the complainant and others working for it."

The remaining particulars relate to the actions taken by the respondent against Mr. Dwight. These are:

- "(1) The complainant is a licensed crane operator holding a hoisting engineer's certificate of qualification pursuant to The Operating Engineers Act, R.S.O. 1970, c. 333. The complainant owns his own crane.
- (2) From June, 1978, to April 8th, 1980, the complainant worked for Ward Crane Rentals Ltd. supplying his own labour and furnishing his own mobile crane, and was paid by Ward Crane Rentals Ltd. for his services.

- (3) From time to time in the aforesaid period, and in the two years prior, the complainant was refused membership in the respondent union.
- (a) In June, 1976, the complainant approached Mr. Gus Gosse, a business agent for the respondent, to obtain an application for membership in the respondent union and was told by Mr. Gosse that it was not necessary that he become a member of the respondent union.
 - (b) In the winter of 1976, the complainant again approached Mr. Gosse with a request for membership in the respondent union and was again informed that it was not necessary that he become a member of the respondent union.
 - (c) On May 28, 1978, the complainant attended at the offices of the respondent union to apply for membership in the union and was informed by Mr. Gosse that he should reattend after obtaining his operating engineer's license.
 - (d) The complainant completed the required test to obtain a hoisting engineer's certificate of qualification and was informed on June 1st, 1978, that his Certificate Number would be 053561. He attended at the offices of the respondent union on the same date with a cheque for initiation and monthly dues and informed Mr. Gosse as to his Certificate Number. Mr. Gosse informed the complainant that he would have to take the matter up with Ernie Ford, a business agent for the respondent union.
 - (e) By telephone the following day, Mr. Ford informed the complainant that he could not submit a membership application form and that he would not be admitted into membership by reason of problems with owner-operators of cranes, but further advised him that the complainant's case would go before the Union Executive Board.
 - (f) Approximately two weeks later the complainant telephoned Mr. Ford at the office of the respondent and was informed that Mr. Ford required documentary proof that the complainant was the owner of a crane. On the following day the complainant delivered to the office of the respondent union a copy of the cancelled cheque used to purchase the machine in question together with a loan statement.
 - (g) On or about June 16th, 1978, the complainant again telephoned Mr. Ford and asked as to the status of his application and whether the respondent had all the docu-

ments required. Mr. Ford informed the complainant that the respondent union was not accepting any more owner-operators into membership at that time and would not process the application of the complainant until the question of owner-operators was resolved.

- (4) The complainant continued to work for Ward Crane Rentals Ltd. as the owner/operator of a crane until April 8th, 1980. On that date a grievance brought by the respondent union against Ward Crane Rentals Ltd. was settled between those parties and a consent order signed prior to the hearing of the referral of the grievance by the Board. (File No. 2408-79-M).
- (5) The respondent union in that grievance alleged that Ward Crane Rentals Ltd. was improperly sub-contracting work to the complainant herein, among others, contrary to Article 3.4 of the Provincial Collective Agreement then in force between the Operating Engineers Employer Bargaining Agency and the respondent Union herein. The Minutes of Settlement and consent order signed included a direction that Ward Crane Rentals Ltd. shall forthwith cease and desist from sub-contracting work to the complainant, among others.
- (6) On April 9th, 1980, the complainant attended at the offices of the respondent union and was informed by Mr. Ford that the respondent union desired to get rid of owner/operators and that it was the respondent's position to support the owners of large crane operations. The complainant asked about obtaining a collective agreement and Mr. Ford also informed the complainant that the respondent union did not intend to enter into any more collective agreements with owner/operators. The complainant also met with Mr. Rick Watson, a Local 793 business agent, and was permitted to complete a membership application form and submit a cheque to cover the initiation fee.
- (7) On April 29th, 1980, the complainant was informed his application for membership in the respondent union had been refused. The complainant and another owner/operator attended at the Union Hall to meet with Mr. Ford, and were referred to Mr. Chris Dowdell, the recording secretary for the union, who informed the complainant that the application for membership was rejected on the advice of the union solicitor.
- (8) On April 30th, 1980, the complainant telephoned Mr. Ford and was informed by Mr. Ford that his membership application had been rejected by reason of high unemployment.
- (9) The complainant understands that other individuals have been admitted into membership in the respondent union after April 26th, 1980.

For purposes of deciding whether a *prima facie* violation of the Act is established we must accept, as if proven, the particulars set out above.

4. The sections of the Act which the complainant alleges have been violated are:

“38. (1) Notwithstanding anything in this Act, but subject to subject to subsection 4, the parties to a collective agreement may include in its provisions,

(a) for requiring as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;

(2) No trade union that is a party to collective agreement containing a provision mentioned in clause (a) of subsection 1 shall require the employer to discharge an employee because,

(a) he has been expelled or suspended from membership in the trade union; or

(b) membership in the trade union has been denied to or withheld from the employee,

for the reason that the employee,

(c) was or is a member of another trade union;

(d) has engaged in activity against the trade union or on behalf of another trade union;

(e) has engaged in reasonable dissent within the trade union;

(f) has been discriminated against by the trade union in the application of its membership rules; or

(g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable.

60. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

60a. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

136. (1) A designated or certified employee bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of the affiliated bargaining agents in the provincial unit of affiliated bargaining agents for which it bargains, whether members of the designated or certified employee bargaining agency or not and in the representation of employees, whether members of an affiliated bargaining agent or not."

5. The relevant sections of the collective agreement are:

"ARTICLE 2 – RECOGNITION

- 2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer for whom the Union has bargaining rights within the Province of Ontario engaged in work covered by the schedules and classifications set out in this agreement, and any additional classifications as may be agreed to by the parties.

ARTICLE 3 – UNION SECURITY

- 3.3 Employees working under this Agreement shall be members of the Union in good standing, or make application to become members of the Union within seven days of hiring or be replaced upon written request by the Union.

- 3.4 (a) The Employer agrees to engage only those sub-contractors and equipment rentals (except equipment dealers) who are in contractual relations with the Union to perform work set out in the classifications of this agreement or as otherwise agreed to by the parties.

(b) Owner-Operators who perform work covered by this agreement shall be signatory to an Agreement with the Union and shall be

- (i) a member in good standing of the Union; and
- (ii) in good standing on contributions under the Health Plan, Pension Plan and for Working Dues, as required by this Agreement.

If the Union advises an Employer bound by this Agreement that an owner-operator engaged by such Employer is in violation of this Article, the Employer shall within 24 hours replace such owner-operator

- 3.5 (a) As a condition of employment the Employer shall require each employee to sign a form which authorizes the Employer to deduct regular monthly Union dues, working dues, initiation fees and annual assessments from the employee's pay.

The regular monthly Union dues shall be deducted from each employee on the first pay period of each month.

The union shall notify the Employer of the amounts and any changes thereto of the above-mentioned deductions.

- (b) All dues, fees and assessments so deducted shall be remitted together with Pension and/or Benefit contributions as set out in this Agreement on or before the 15th day of the month following the month in which such deductions were made. The Employer shall, when making all remittances to the Union, identify employees both by name and Social Insurance Number and indicate the amount deducted from each employee."

The rates of pay set out in the appendices apply to "operators" of various pieces of equipment. There are no rates for "owner/operators". The provisions in respect of breaks, reporting allowances, recall and premium time call-out are each made applicable to "employees".

6. The respondent's argument in support of its request to have the Board dismiss the complaint without hearing evidence centers on its contention that Mr. Dwight is not an employee covered by the scope of the union's recognition as defined under article 2.1 of the collective agreement. The respondent asks the Board to find on a reading of the agreement that Mr. Dwight is an owner-operator within the meaning of article 3.4(b) of the agreement and hence not an employee covered by the recognition clause. In support of its position that a distinction must be drawn between dependent contractor employees and non-dependent contractor employees, when considering the scope of the union's recognition, the respondent referred the Board to *General Concrete of Canada Ltd. and Local 487, United Cement Lime and Gypsum Workers*, (1978), 22 O.R. (2d) 65. The union maintains that when the instant agreement is read in its entirety it is clear that the term "owner-operators" used in article 3.4(b) refers to dependent contractors who are not "employees" within the meaning of article 2.1 or article 3.3. If the Board accepts its submissions in this regard the respondent union maintains that it must find that no violation of section 60 or section 38 can be established. The union argues that section 60 imposes a duty on the union in respect of the quality of its "representation of any employees in the unit" and because Mr. Dwight is not an employee in the bargaining unit the union has no duty of fair representation to him. Similarly, the union reads section 38(2) of the Act as restricting the right of a trade union to require the employer to discharge an employee within the bargaining unit it represents because membership in the trade union has been withheld. The union maintains that Mr. Dwight is not an employee within the meaning of the section and furthermore, that the actions which the union has taken against him do not constitute an attempt by the union to "require the employer to discharge" because he was not a member of the trade union. The union argues, citing *Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 57 D.L.R. (3d) 199, that where a union security clause has been violated it is proper for a union to seek the enforcement of the clause at arbitration and that the finding and order of the "court of proper jurisdiction" does not constitute a "requiring of the employer to

discharge” within the meaning of section 38(2) of the Act. The union also maintains the Mr. Dwight was in breach of the other article 3.4(b) conditions and that his discharge was because these other conditions had not been met and not because he was without union membership. In any event, it is the position of the union that section 38(1) does not catch sub-contracting arrangements and hence the union’s actions in moving under section 112a in respect of an alleged violation of article 3.4(a) could not have brought it within section 38(2).

7. The union relies on the findings and consent order of this Board in the section 112a arbitration proceedings brought by it. The union maintains that Mr. Dwight was given notice and was entitled to participate, and having failed to do so he is bound by the decision of the Board and cannot return to Ward Crane Rentals because the Board ordered that he be removed. The union maintains that Mr. Dwight should have pressed the arguments which he is now making before the Board in the section 112a proceeding and, having failed to do so, he is bound by the decision of the Board in that matter, as is Ward Crane Rentals. The union argues further that another panel of the Board having directed Ward Crane Rentals to “cease and desist from sub-contracting work to or engaging. Brian Dwight”, this panel cannot sit in appeal of the other panel or alter the result.

8. With respect to the alleged breach of section 60a the union argues that it is not engaged in the referral of persons such as Mr. Dwight (i.e. sub contractors) to employment and consequently, section 60a does not apply. The union argues that there is nothing in the particulars to suggest that Mr. Dwight was ever referred or refused referral to employment as would bring his complaint within the ambit of section 60a. The union argues further, that there is nothing in the particulars relating to intimidation or coercion as would found a complaint under section 61 of the Act. Section 136(1) of the Act places a duty upon a certified employee bargaining agency not to act in a manner that is arbitrary, discriminatory or in bad faith in the representation of the affiliated bargaining agents which it represents. The union argues that section 136(1) has no application to this complaint. It is the position of the union that the complaint amounts to an attempt by Mr. Dwight to establish a claim for union membership as a matter of right. The union maintains that there is no such right under *The Labour Relations Act* or any other statute or at common law. The union asks the Board to accept its submissions and dismiss the complaint.

9. The complainant maintains that as a dependent contractor he is both an employee within the meaning of the Act and an employee covered by the union’s recognition. The complainant maintains that the “owner-operators” referred to in article 3.4(b) are independent contractors who are not employees within the meaning of the Act. It is the complainant’s position that dependent contractor owner-operators who are employees under the Act are also employees within the meaning of articles 2.1 and 3.5 of the collective agreement. The complainant maintains that the *General Concrete* case, *supra*, does not stand for the proposition that dependent contractors and other employees cannot be in the same bargaining unit and asked the Board to remember that the issue before it is whether a *prima facie* case is made out on the particulars. The complainant maintains that evidence must be heard if the meaning of articles 2.1 and 3.3 is to be ascertained in the context of an agreement which does not distinguish between employees and dependent contractors. The complainant argues, therefore, that the union’s treatment of him as a non-employee contractor under article 3.4(b) and its decision to press for his discharge under article 3.4(b) constitutes a breach of the union’s duty under section 60. The complainant maintains that the consent order which issued from the Board in the section 112a proceedings does not affect his right to a hearing. The complainant argues that the doctrine of *res judicata* does not apply because he was not a party

to the initial proceedings and, although notice was given, no hearing was held as the grievance was settled contrary to his interests. The complainant argues further, that his status as a dependent contractor was never raised in the initial proceedings. The union was quick to point out in reply that it was not arguing *res judicata* but the integrity of the Board's procedures in relying on the Board's decision in the section 112a matter.

10. The complainant argues that not only is a *prima facie* violation of section 60 made out but also a *prima facie* violation of section 38(2). The complainant maintains that in filing the grievance, pursuing it to arbitration and settling with the company on the basis of the consent order which issued, the union "required" the company to discharge him because he was not a member of the trade union as required by article 3.4(b); a section 38(1) type of clause. The complainant argues that because it is alleged on the particulars that he has been treated differently than other persons in respect of membership in the trade union, a *prima facie* case of discrimination is made out as would bring the matter within section 38(2) of the Act.

11. The complainant relies upon his submissions in respect of a section 60 violation in support of his contention that section 136(1) has also been violated. The complainant admitted that section 61 is not relied upon as strongly as the other sections but asked the Board to characterize the union's actions in respect of the manner in which it compelled him to refrain from becoming a member of the trade union, as constituting a form of intimidation and coercion as would result in a breach of section 61 if the union's allegations were proven. He admitted that the union did not refer him to employment within the meaning of section 60a but maintains that by its actions the union refused him employment. The complainant asks the Board to find that a *prima facie* case has been established and to hear the evidence in support of his allegations.

12. The company asks the Board not to allow the complainant to amend his pleadings to include section 38(2). It maintains that it had no notice. The company adopts the union's position in respect of the effect of the Board's order in the section 112a proceedings. Finally, the company takes the position that Mr. Dwight is not an employee covered by the collective agreement and consequently supports the position advanced by the union with respect to sections 60 and 38.

13. Turning to the merits. At the hearing the complainant added section 38 to the sections of the Act relied upon in support of his allegations. In our view neither the union nor the company is prejudiced if we permit the complainant to rely upon section 38 as a section alleged to have been violated. The complainant is relying on the particulars filed in advance of the first day of hearing. There has been no attempt to expand the factual parameters of the complaint. Where, as in this case, the matter is not to be heard but submissions made in respect of the application of rule 46(1), and where the other parties are prepared to argue the application of the section to the facts as particularized, no prejudice exists as would cause the Board to refuse to allow the section to be cited and relied upon by the complainant.

14. The effect, if any, of the Board's order in the section 112a complaint filed by the union is a matter of contention. The submissions of the parties have been set out. The union charged the company with a breach of article 3.4(b) in respect of its use of Mr. Dwight and proceeded to arbitration under section 112a of the Act for enforcement of the section. Mr. Dwight was served with notice but did not attend at the arbitration hearing. The parties settled the matter at the hearing and on consent of the parties the following order issued from the Board:

“(i) Ward Crane Rentals Limited has improperly subcontracted work covered by the provincial collective agreement between the Operating Engineers Employer Bargaining Agency and the International Union of Operating Engineers, Local 793, in effect between June 19, 1978 and April 30, 1980, to James Ingram and/or James Ingham Enterprises Ltd.; Brian Dwight; and Harry Brown and/or H. B. Crane Rentals contrary to the said collective agreement and, in particular, article 3.4 thereof.

(ii) Ward Crane Rentals Limited shall forthwith abide by all of the terms and conditions of the said collective agreement and, without limiting the generality of the foregoing, the provisions of article 3.4 thereof in respect of the subcontracting of work covered by the said collective agreement.

(iii) Ward Crane Rentals Limited shall forthwith cease and desist from violating the said collective agreement, and, without limiting the generality of the foregoing, shall forthwith cease and desist from subcontracting work to or engaging James Ingham and/or James Ingham Enterprises Ltd.; Brian Dwight; and Harry Brown and/or H. B. Crane Rentals in the manner that is contrary to the said collective agreement.”

Both the union and the company argue that in view of the order of the Board in the section 112a arbitration proceedings Mr. Dwight cannot attain the relief he seeks and is estopped from making arguments which he could have made had he attended at the section 112a hearing.

15. In a section 112a application the Board sits as a Board of Arbitration and under section 112a(3) the Board has the “exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance ... and the provisions of subsections 5a, 7, 8, 9, 10, and 11 of section 37 apply *mutatis mutandis* to the Board and to the enforcement of the decision of the Board.” The Board, therefore, is concerned with the interpretation, application, administration or alleged violation of a collective agreement when it sits under section 112a of the Act. In this case the company and the union settled the grievance and, on consent of the parties, the Board issued the order which is set out above. There was no hearing in the matter. In these circumstances, and regardless of whether Mr. Dwight is an employee under the agreement or a contractor who stood to be only commercially affected by the Board’s determination in the section 112a complaint, he is entitled to rely upon his rights under the Act. Where a trade union violates section 60 or section 38(2) or any other section of the Act in proceeding to arbitration and in obtaining an order, as in this case, the Board has the authority, under its section 79 remedial authority or under its power of reconsideration, to set aside the section 112a determination and to unravel the legal complexities caused by its earlier determination. The failure of the person affected by the Board’s order in the section 112a proceeding to attend at the Board for purposes of the section 112a hearing does not alter this result. Having been served with notice and having failed to attend, Mr. Dwight cannot attack the Board’s section 112a decision on the grounds of a denial of natural justice. However, he is entitled to rely upon his rights under the statute.

16. The employee status of persons owning their own vehicle or equipment has long posed difficult labour relations questions with particular relevance to the construction industry where the use of these persons has been and continues to be widespread. Are these persons employees and, if so, should they be represented by the same trade union and be included in the same bargaining units as employees not owning their own vehicles and

equipment? Prior to the 1975 “dependent contractor” amendments to *The Labour Relations Act* the employee status of these persons was determined by an application of the traditional fourfold test used to determine employment status at common law. On the particulars filed it is conceivable that even on a pre 1975 application of these tests that Mr. Dwight may have been found an employee and eligible for union representation within an all-employee bargaining unit. The 1975 amendments brought persons, although supplying a vehicle or equipment, as working under a contract for services, who more closely resemble an employee than a dependent contractor within the meaning of “employee” for purposes of *The Labour Relations Act*. The statute was further amended to restrict the Board from including dependent contractors in a bargaining unit with other employees unless satisfied that a majority of dependent contractors wished to be included in such a unit.

17. A dependent contractor, as defined in section 1(1) (ga) of the Act, is an employee for purposes of the Act. However, a dependent contractor may or may not be an employee within the scope of a trade union’s “all employee” recognition. (See *General Concrete of Canada Ltd. and Local 487 United Cement Lime & Gypsum Workers*, *supra*.) It is the intention of the parties which is determinative. The parties may, or may not, intend to include dependent contractor employees in an “all employee” bargaining unit. Mr. Dwight has made out a *prima facie* case that he is a dependent contractor within the meaning of the Act. In the absence of an express exclusion of dependent contractors from the all-employee unit in this case and in the face of the complainant’s claim that he performed services exclusively for, and derived all of his personal income from, Ward Crane Rentals for an approximate two-year period it is our view that the term “employee” in article 2.1 is at least latently ambiguous. Accordingly we are not prepared to dispose of this matter without first permitting the complainant to adduce the evidence which he seeks to adduce in respect of the intention of the parties in framing the scope of the union’s recognition. If Mr. Dwight is an employee represented by the union the *prima facie* violation of sections 60 and 38(2) of the Act has been made out.

18. The Board has a broad discretion in the application of Rule 46(1). The Rule provides:

Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

If Mr. Dwight is a dependent contractor but not an employee represented by the trade union, the requirement that he be a member of the trade union in order to perform work for the company and the particulars as they relate to his dealings with the trade union raise difficult issues with respect to the application of sections 38, 60a and 61 of the Act. The Board has decided that it is not prepared to dismiss the alleged violation of these sections without first hearing full evidence and argument. Accordingly, the Registrar is hereby directed to list this matter for hearing.

0633-80-U Service Employees Union Local 204, Complainant, v. Kennedy Lodge Nursing Home, Respondent

Discharge for Union Activity – Duty to Bargain in Good Faith – Contracting out of some bargaining unit work – Whether duty to disclose after bargaining completed – Reducing costs of cleaning motive for contracting out – Number of employees laid-off – Whether agreement preserving employees' jobs – Whether contracting out bargaining unit work violation of Act

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members M. J. Fenwick and J. A. Ronson.

APPEARANCES: *Jeffrey Sack, Marcelle Elhadad-Goldenberg and Paul Brennan for the applicant; D. I. Wakely and D. Duncan for the respondent.*

DECISION OF VICE-CHAIRMAN E. NORRIS DAVIS, AND BOARD MEMBER J. A. RONSON; October 31, 1980

1. This is a section 79 complaint alleging that the respondent contravened sections 14, 56 and 58 of *The Labour Relations Act* by the lay-off of all its housekeeping and janitorial employees and contracting out the work formerly done by such employees.

2. The parties agreed that the findings of fact in paragraphs 3, 4, 5, 6, 7 and 8 in Board File No. 0632-80-R should be applied to the present proceedings, and that exhibits filed in Board File No. 0632-80-R should become exhibits in the instant proceedings. Those paragraphs are reproduced as follows:

"3. Kennedy Lodge Nursing Home, as its name implies, operates a Nursing Home and its organizational structures provides for four departments, each of which reports through a supervisor to the administrator. One department is Building Services department which is comprised of a number of sub-departments. Prior to the alleged sale to Cosmos Building Maintenance Limited, these sub-departments were Repair and Maintenance, Laundry, Housekeeping, and Janitorial. Subsequently, as the result of a written agreement between Kennedy and Cosmos, the services previously performed in the housekeeping and janitorial sub-departments by employees of Kennedy have been totally performed by employees of Cosmos. Kennedy laid off some sixteen employees being all of the full-time and all of the part-time Kennedy employees in the house-keeping and janitorial classifications. At the time of the hearing Kennedy was employing a total of 65 full-time employees and 65 part-time employees who were covered by separate collective agreements to which the applicant is a party as the bargaining agent. Also, three of the laid-off employees have been recalled by Kennedy to other classifications within the bargaining unit.

4. The agreement between Kennedy and Cosmos was entered into on April 16, 1980 and is to be effective from May 1, 1980 for a period of one year subject to termination on thirty days notice. Cosmos is in the business of supplying janitorial services to some fifty buildings in Toronto in-

cluding several Nursing Homes. The form of contract entered into with Kennedy is the form of contract generally used by Cosmos. Attached to the agreement is a schedule of services to be performed by Cosmos and embraces the same services formerly performed by Kennedy House-keeping and Janitorial employees, except that Cosmos additionally performs three items, i.e., window cleaning, steam cleaning of carpets and stripping and waxing of floors, all of which are relatively infrequent and had been previously contracted out.

5. No assets of any kind passed between Kennedy and Cosmos. Kennedy, at the time of entering into the agreement endeavored unsuccessfully to sell its cleaning equipment and supplies to Cosmos. Those items now remain stored at Kennedy. By the agreement, Cosmos uses its own equipment and supplies, and a locked storage room on Kennedy premises is provided for this purpose.

6. The Supervisor of the Building Services Department, Wayne Perras, reports to the Administrator and, amongst his other responsibilities, he monitors the performance of Cosmos and reports any contract deficiency to a Cosmos supervisor. Cosmos employs one full-time supervisor in the Kennedy premises, who reports to another supervisor having responsibility for another building in addition to the Kennedy building. Cosmos operation at Kennedy is staffed by some ten employees of Cosmos of whom eight, at the time of entering into the agreement with Kennedy, were employed working for Cosmos in other buildings, and two other persons newly hired by Cosmos for the Kennedy operation. No former Kennedy employees now work for Cosmos.

7. Cosmos Building Maintenance Limited is a Division of 380688 Ontario Limited which is wholly owned by its President, Mr. Apostopoulos, and has been operating for some three years. Other than the agreement of April 16, 1980, there is no business or financial relationship between Kennedy and Cosmos or Apostopoulos.

8. The agreement of April 16, 1980 resulted from an initial solicitation by a Cosmos salesman, Dan O'Hare, in December, 1979 which resulted in a written quotation dated December 6, 1979 directed to Wayne Perras, Supervisor of Kennedy's Building Services Department. Mr. Perras, showed the letter to David Duncan, the Kennedy Administrator, who reviewed it and returned it to Perras as being "worthless". Duncan states that the quote was obviously for an office building and that the schedule of work was totally inappropriate to a Nursing Home. In the latter part of December Duncan informed his superior, a Mr. Angelo Tuzi, of the item as a matter of information. Mr. Tuzi felt the matter should be pursued and Duncan agreed to get further information."

In addition, the parties agreed that it was in November, 1979 that Wayne Perras, the respondent's supervisor of the Building Services Department, was first approached by a salesman of the company to which the work was ultimately contracted; that the grievors received notice of termination during the afternoon of April 30, 1980 to be effective immediately and were paid

in lieu of notice; that those employees affected retained their seniority rights for six months and were subject to recall, and one employee subsequently returned to a full-time position and three employees returned to part-time positions; and that the respondent through its contracting out achieved savings of approximately \$50,000 per year. The Board also received oral evidence from which it makes the following findings of fact.

3. The complainant in mid-January, 1979 delivered contract proposals in respect to the renewal of an expiring collective agreement covering the full-time workers, and proposals in respect to a first-time agreement covering part-time workers. Amongst those proposals were one headed "Job Security" and reading, "The number of persons on payroll as of January 17, 1979 shall be the minimum level of staff"; and one headed "Contracting Out Clause" reading, "There will be no contracting out of any work performed by the bargaining unit before new rules are implemented. They must be first agreed to by the Union."

4. Negotiation meetings were held between the parties on February 20, 1979, March 20th, April 30th and a meeting in April under the auspices of a Conciliation Officer. The proposal in regard to contracting out was not an issue at the conciliation stage as the union felt that contracting out was not a problem and that the proposal relating to job security would be more beneficial. The issue of contracting out had been discussed at one of the meetings between the parties. Mrs. Goldenberg, the union spokesperson at those meetings, testified that the company representatives in respect to the issue enquired as to why the proposal was made and that there had been no problem. Mrs. Goldenberg testified that "I didn't infer at all that they were not going to contract out. I thought that was a normal request for justification". In cross-examination, the question was put, "Did you ask the employer if he intended to contract out?" and the response was, "No". Mr. Duncan, Administrator for the respondent, confirms that those proposals were discussed only once and that he had asked the union for their rationale, and that indicated the company's rejection of those proposals as being an infringement of Management Rights as contained in the existing agreement.

5. A "no-Board" report was issued June 6, 1979 and on August 14, 1979 a memorandum of settlement was reached which was ratified by the union membership on August 21. Formal collective agreements were executed on December 16th. Retroactive wage payments were made two pay periods following the ratification meeting and all other terms then implemented.

6. The evidence is clear that during the period from mid-January, 1979 through the August 21st ratification, the respondent was not then investigating or entertaining the possibility of contracting out any work then being done by employees. The possibility of contracting out of housekeeping and janitorial services was first introduced in November, 1979 when Perras secured an unsolicited contact from O'Hare, a representative of Cosmos Building Maintenance. This contact was followed up by a quote made by O'Hare and passed to Duncan through Perras. Duncan testified that the quote was obviously not applicable to a Nursing Home and that he was not interested. Duncan testified that he had not up to this time entertained any thought of contracting out and that he was not then even aware that there were firms engaged in the Nursing Home cleaning business. O'Hare submitted an amended quotation dated January 22, 1980. Duncan considered this a "low balling" quote and left it in abeyance.

7. It appears that some representatives of Cosmos Building Maintenance contacted Duncan's superior, a Mr. Tuzi, who queried Duncan about housekeeping costs and the

Cosmos bid. The upshot was that Duncan undertook to look further into the matter. Duncan then investigated the competence and reliability of Cosmos in respect to Nursing Home cleaning and, ultimately, met with O'Hare on March 25, 1980, at which meeting O'Hare amended his January 22nd quote of \$8,000 per month to \$11,800 per month. Duncan testified that at this figure there would be little savings over the costs being experienced in the current operation and he, therefore, told O'Hare that the price was too high and that if a reasonable price was put forward he "might look at it". On April 2, 1980, O'Hare returned with a price of \$9,000 per month which Duncan states would represent savings to the respondent of some \$4,300 - \$4,500 per month over its then current costs.

8. A formal contract for a twelve-month period was entered into by the respondent and Cosmos on April 16, 1980, whereby Cosmos was to provide all services then done by the respondent's housekeeping and janitorial employees. Cosmos provides all supplies used and the equipment required. Additionally, services respecting window cleaning and steam cleaning of carpets which had been previously done by outside contractors were included in the Cosmos price, as was stripping of floors which had been done on overtime by the respondent's employees.

9. Duncan testified that the major moving force behind the decision to contract out was to save money and that it would also result in some simplifying of administration. He specifically testified that the fact that employees were unionized was not in any way a factor in the decision. Duncan gave evidence that in fiscal 1979 (ending August 31st) the respondent suffered a small operating loss, and in fiscal 1978 had had a small operating profit. The fiscal 1980 statements were not yet available, but Duncan expects a small operating profit. He pointed out that the physical facilities were built to accommodate 289 beds and that mortgage financing was predicted on that. The respondent has only been licensed for 245 beds by the Ministry of Health. He also pointed out that in late 1979, the Ontario Nursing Home Association, of which the respondent is a member, sought an increase of \$4.95 per day in the *per diem* rates. On April 1, 1980, the Ministry of Health approved an increase of \$2.38 per day with the matter to be reviewed again before October 1, 1980. Duncan states that the respondent is not in a financial crisis but that the return on investment represents less than "bank interest".

10. On April 30, 1980, Duncan met with the employees of housekeeping and janitorial services and a union representative was present at Duncan's request. The meeting was near the end of the shift and Duncan announced that the cleaning services were being contracted for "mainly because of economic considerations" and that, as a result, all "the housekeeping aides and janitors at Kennedy Lodge are being laid off effective April 30, 1980". Duncan drew attention to the security provisions of the collective agreement and the right of recall during a period of six months. He also announced that two vacancies in other departments would be posted next day for which the affected employees were entitled to apply. The following day Duncan met with the Chief Steward and the Business Agent of the union who introduced the possibility of those employees bumping into other departments. Duncan pointed out that the collective agreement did not permit cross-department bumping but that if the union would talk to laid-off employees and ascertain those interested in other department jobs that, perhaps, a way could be found to make such transfers without contracting grievances. There was no follow-up discussion on this topic.

11. In cross-examination, Duncan stated that he had seen no reason to discuss the housekeeping and janitorial situation with the union in the period leading up to the April 16, 1980 contract. In his words, "We had frank, open discussions if there was a problem there was

no problem then but we were simply investigating a service.” When questioned as to whether he considered he had acted in good faith by not mentioning the matter to the union until April 30th, he stated, “It was not bad faith. I consider it a management right. It’s in the collective agreement. I didn’t think I had to check with the union.”

12. Duncan testified that he had never discussed with the union any dissatisfaction with the level of cleanliness, or the cost of services, or the need to save money. He admitted that, in effect, by the subcontracting of services he relieved the respondent of financial burdens negotiated with the union six months previously.

13. The initial issue before the Board is the respondent’s preliminary objection that a Board of Arbitration has been set up to hear the union’s grievance and that the matter is essentially a dispute over the interpretation of the collective agreement, and the respondent requests the Board to defer to the Board of Arbitration. The respondent refers us to a line of Board decisions dealing with this issue and in particular the case of *The Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug 427 where the Board states:

“4. Where an alleged unfair labour practice also constitutes at the same time an alleged breach of a collective agreement, the Board has generally chosen to exercise its discretion under section 79 of the Act and defer the matter to grievance arbitration. (See *Collingwood Shipyards* [1967] OLRB Rep. July 376; *Sunnybrook Food Market (Keele) Ltd.* [1972] OLRB Rep. March 210.) However, in exceptional circumstances where the arbitration process is “clearly unavailable or unsuitable to resolving the issue”, the Board will depart from its general practice and will itself hear the matter. Examples of such exceptional circumstances include situations where it is alleged that the union has procured the discharge of an employee (*Bowin v. United Ass’n of Journeymen et al* 67 CLLC ¶ 16,004), where it is alleged that there has been collusion between the union and the employer to the detriment of an employee (*Pitt Street Hotel Ltd.* 63 CLLC ¶16,275), where it is obvious that a grievance arbitrator cannot provide effective relief (*Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418), and where it is obvious that the interests of an employee will not be effectively represented at arbitration because of a direct conflict between the interests of the trade union and those of the employee (*Imperial Tobacco Products (Ontario) Limited, supra.*)

6. Counsel for the respondent contended that the facts of this case were such that the Board should not defer to arbitration. In particular he noted his concern that a number of months might pass before the arbitration procedure was completed. The dangers of such a delay, he contended, would be further heightened by the fact, as established in evidence, that the employees have voted to give authority to the complainant trade union to call an illegal strike over this issue.

7. Although the complaint is framed in terms of an alleged breach of *The Labour Relations Act*, the complainant is in fact seeking relief from an alleged breach of the collective agreement. The issue is one which clearly falls within the jurisdiction of a board of arbitration established

pursuant to the terms of the collective agreement itself, and there appears to be no impediment to having such a board of arbitration properly hear and dispose of the matter. This being the case, the Board declines to depart from its established practice of deferring to arbitration. It should be noted in this regard that the length of time it takes to constitute a board of arbitration and to schedule a hearing are, to a large extent, within the control of the parties and their nominees. We would hope that the parties will seek to have this matter go on to arbitration with all due dispatch. In any event, we decline to depart from the Board's general policy in this regard solely on the basis of a possibility of delay in the arbitration process, particularly in that any such delay is unlikely to cause the complainant to suffer irreparable harm.

8. The application is hereby dismissed.”

The complainant takes the position that its allegations, if proven, go beyond a breach of the collective agreement and raise issues of bad faith bargaining, destruction of the bargaining unit and undermining the union which issues cannot be effectively dealt with by a Board of Arbitration. The complainant argues that the Board's decision in the case of *Westinghouse of Canada Limited*, [1980] OLRB Rep. Apr. 577 establishes that “collective bargaining as established under the Act has an economic or productivity component to it”, the deliberate avoidance of which through contracting out is a contravention of the Act.

14. We are of the opinion that in the instant case, that if the complainant's allegations of bad faith bargaining are proven, that the dispute is one going beyond interpretation of the collective agreement and is properly characterized as relating to the general structure of collective bargaining in the province. As was stated by the Board in the *Kodak Canada Ltd.* case, [1977] OLRB Rep. Feb. 49, at paragraph 9,

“... Although grievance arbitration is the proper forum for the resolution of matters relating to individual collective agreements, it is the Labour Relations Board that has been entrusted with the responsibility for resolving matters that go to the general structure of collective bargaining in this Province. Where such matters arise, therefore, it is this Board that provides the proper forum for their resolution, and deferral to grievance arbitration can no longer be the appropriate response.”

15. The matters raised in the instant case have implications extending beyond the parties collective bargaining relationship. The parties raise the issue of the effect of a section 14 violation on actions subsequently taken within the ambit of the collective agreement. The parties raise the further issue as to the statutory obligation on an employer, during the life of a collective agreement, to seek a curative response from the bargaining agency before taking action to correct a productivity or adverse cost condition. These issues, in our view, go directly to the administration of *The Labour Relations Act* and make it inappropriate for us to defer to grievance arbitration.

16. We shall now deal with the alleged violation of section 14 of the Act which provides,

“The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall

bargain in good faith and make every reasonable effort to make a collective agreement.”

There is no real dispute but that the memorandum of settlement, signed on August 14, 1979, became on ratification by the membership on August 21st a binding collective agreement. The complainant concludes that there was no evidence of any intention by the respondent to contract out before some time in November or early December. This was prior to the signing of the formal collective agreement incorporating the memorandum of settlement on December 16, 1979. The complainant argues that in accordance with the principles enunciated in the case of *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, there is a duty on an employer to disclose, during bargaining, a firm intention to make a change such as was involved in this case and that such duty of disclosure in this case should be effective until the formal collective agreement was signed on December 16, 1980.

17. The question raised is whether the section 14 obligations were extended during the period of August 21st to December 16th. The evidence in the instant case clearly establishes that as of August 21, 1979 a collective agreement had been brought into existence by the parties. The obligations of section 14, which are directed to the conduct of the parties in their efforts to reach a collective agreement, are no longer applicable since an agreement is concluded. A similar issue was raised, in a somewhat different manner, in the case of *Inglis Limited*, [1977] OLRB Rep. Mar. 128. The Board there stated at paragraph 15,

“Counsel for the complainant argued that the duty set out in Section 14 of the Act is a continuing duty requiring the employer to negotiate the terms of a mid-contract relocation with the union. The Board rejects this argument. The duty stipulated in Section 14 is in respect of the duty to bargain for a collective agreement. The scheme of the Act is such that having concluded a collective agreement subsequent disagreements are ultimately resolved by third party adjudication. The Ontario Act does not require mid-term bargaining over job security issues as is required under certain other Statutes. [see Sections 150-153 Canada Labour Code]. This is not to say that the effects of these kinds of decisions should not be discussed with the bargaining agent as a party having a vital interest and in this case an ongoing relationship with the company.”

In the instant case, at the time of conclusion of a collective agreement there then existed no plans or intention by the respondent to contract out work and, therefore, there existed nothing to which an obligation to disclose could attach.

18. The complaint insofar as it alleges a violation of section 14 arising from a failure to disclose must be dismissed.

19. We turn now to the alleged violations of section 56 and 58 of the Act. The complainant argues that the instant case falls within the rationale of the *Westinghouse Canada Limited* case, *supra*. It is argued that the respondent's failure to raise with the union the economic disadvantage of performing work through its own employees is an avoidance of its collective bargaining obligations. It is argued that the action in the instant case was solely to avoid the economic impact of paying wage rates agreed to in the collective agreement, and that by the respondent's decision to put himself out of reach of the economic impact of this aspect of the collective bargaining relationship, it can be inferred that the respondent was motivated

by anti-union considerations. The complainant relies on the *Westinghouse* decision and in particular on paragraphs 63, 64, 65 and 66 which read as follows:

“63. The purpose of *The Labour Relations Act* is to provide a statutory framework within which employees are encouraged to join together and bargain collectively with their employer. The underlying assumption is that employees who bargain collectively are on a more equal footing with their employer than unorganized employees and have a greater say in determining their terms and conditions of employment. It is axiomatic, therefore, that collective bargaining as established under the Act has an economic impact in terms of both the price of labour and the scope of the employer’s unilateral authority. Under our Act the employee’s share of the economic pie and the scope of management’s authority vis-a-vis employee relations must be determined at the bargaining table and against the backdrop of possible economic sanctions by either side. An employer whose employees have decided to bargain collectively cannot escape his obligations under *The Labour Relations Act* and any decision taken to avoid these obligations or to defeat the legitimate collective bargaining aspirations of his employees is in violation of the Act. Under our statute accommodation is sought at the bargaining table. An employer who contracts out his work, relocates or closes his plant or takes any other major business decision to avoid having to deal with his employees collectively through a trade union or to avoid the possibility, in the abstract, of being subject to economic sanctions is guilty of an unfair practice and the Board has so found in a number of cases including *Academy of Medicine, supra*, *Humber College, supra*, and *Consolidated Sand and Gravel, supra*.

64. In many cases the employer will argue economic justification for a business decision which has an adverse impact on the bargaining unit. If an employer acts because his premises are antiquated or because his market is expanding or shrinking or because of transportation factors or for a range of other economic or business reasons which are unrelated to collective bargaining he is clearly not motivated by an anti-union animus and is not restricted, therefore, by *The Labour Relations Act*. Indeed, section 68 of the Act expressly provides that so long as what he is doing is not a strike or lockout he can discontinue operations for cause regardless of the impact on the bargaining unit and the collective bargaining rights of employees.

65. Can an employer faced with economic difficulties caused by collective bargaining-related factors (wages, benefits, seniority, work practices etc.) act to remove himself from his collective bargaining relationship? It may well be that it is more profitable to operate without a union than with one but if an employer can react to this reality simply by moving his business the right of employees to engage in collective bargaining would be seriously undermined. What of the employer who is faced with an economic crisis caused by collective bargaining related factors, seeks relief from the union and is met with an unsympathetic or unsatisfactory response? Assuming that these factors could be established, the answer is

by no means clear. The question, however is not raised by the facts of this case. This company was not faced with an economic crisis and notwithstanding the constraints to productivity perceived by it, there is no evidence that the company ever raised its concerns with the trade union prior to making its decision to relocate.

66. Collective bargaining as established under the Act has an economic or productivity component to it. Indeed, the strike record at the Hamilton plant would have had a telling impact on productivity. Having regard to the nature of collective bargaining and the rights conferred on employees under the Act, projected productivity improvements or a projected increased return on investment resulting from the relocation of a unionized plant, do not establish the absence of an anti-union motive. This is particularly so where an imminent financial crisis does not exist and where there is no evidence that the company ever raised its concerns with respect to productivity at the bargaining table. When reference is had to the 1977 return on investment, the failure of the company to attempt to deal through the trade union in respect of productivity and the evidence which is analyzed in the following paragraphs, we are of the view that the company's decision to relocate was motivated in large part by anti-union considerations."

20. If the complainant's argument was accepted, any action taken by an employer, which has an economic impact upon the bargaining unit would lead to an inference that the employer was motivated by anti-union considerations. For example, employer initiated decisions which resulted in the replacement of bargaining unit employees through process change, methods change, equipment change done solely to effect savings in labour costs would, on the basis of the complainant's argument, in and of themselves justify an inference of anti-union motivation. To accept such a conclusion would appear to be directly contrary to section 68 of the Act which provides in part:

"Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations ... if the suspension, [or] discontinuance ... does not constitute a lockout ...

The Board, in the past, has made clear that "cause" in section 68, *supra*, relates only to "lawful cause". If the cost of doing business is too high in relation to the business revenues generated, the employer, who is motivated solely by correcting that imbalance, is not precluded by the Act from taking that action. Absent restrictions in the relevant collective agreement, business operations are not "frozen" by the collective relationship so long as the action taken is not in any way motivated by the accomplishment of an unlawful objective.

21. Business decisions must be made on the basis of the overall viability of an operation – one aspect of which might be the cost of labour. In the *Westinghouse* case it was found that the company's decision to relocate its operation was "motivated in large part by anti-union considerations". There was evidence in that case that the company had explicitly set non-union operation as a goal to be achieved. However, in the case before the Board there was no evidence that the fact that the employees had engaged in collective bargaining and were represented by a trade union played any part in the employer's decision to contract out some bargaining unit work. We accept Mr. Duncan's testimony on this point. *Westinghouse* makes

it clear that an employer may discontinue operations for cause so long as the decision is not motivated by anti-union animus. A desire to save money and thereby increase profits is not equivalent to anti-union animus simply because the money saved would otherwise have been paid as wages to employees in the bargaining unit.

22. The Board is satisfied on the evidence that the sole reason for the respondent's decision was improving its profitability. The evidence concerning the decision to contract out indicates that the employer was not overly-anxious to change his operations in that fashion. The initial contact with Cosmos was in fact unsolicited. At no point does it appear that the advantages of non-union labour over union labour was ever considered. It was not until a substantial saving was offered that the respondent took the idea of contracting out seriously. The facts of this case do not disclose any desire on the part of the employer to rid itself of union representation of its employees. Rather a legitimate business decision was made which resulted in an annual saving of around \$50,000. The fact that the union and the employees were adversely affected does not of itself taint the legitimacy of that decision.

23. The complainant in argument placed considerable emphasis on the inclusion in the collective agreement's wage schedules of classifications and rates of pay for the positions of Housekeeping Aides and Janitors. It would have the Board draw the inference that by such inclusion the respondent had entered into an undertaking with productivity and economic implications, the avoidance of which by contracting out undermines the rights of the employees to engage in collective bargaining. The complainant also takes the position that the failure of the respondent to discuss and seek a solution to the productivity and economic concerns justifies an inference that the respondent acted for anti-union reasons.

24. The complainant's arguments go to the general thrust of the legislation. The general scheme of the Act is to initially set the scope of recognition of the bargaining agency while leaving the parties maximum freedom to deal with the matter mutually as they see fit. As was expressed in the *Inglis Limited* case, *supra*, at p. 136,

“... It is parties themselves who are best equipped to make the necessary trade-offs between management rights, union rights and employee rights. It is they who are best equipped to make their own bargain and to thereby set the parameters of their own relationship.”

It is, therefore, necessary in determining whether a particular action of the employer strikes at union recognition to direct themselves in this respect. In so doing, the agreement as a whole must be considered and not mere concentration in classifications in the wage schedule.

25. The bargain between the parties is incorporated in the collective agreement entered into by them. Article 6 of that agreement is headed “Management Rights” and provides as follows:

“6.01 The Union acknowledges that all Management rights and prerogatives are vested exclusively with the Employer and without limiting the generality of the foregoing it is the exclusive function of the Employer:

- (a) to determine and establish standards and procedures for the care, welfare, safety, and comfort of the residents in the Nursing Centre;

- (b) to maintain order, discipline, efficiency and in connection therewith to establish and enforce reasonable rules and regulations;
- (c) to hire, transfer, lay off, re-call, promote, demote, classify, assign duties, discharge, suspend or otherwise discipline employees for just cause, provided that a claim of discriminatory transfer, promotion, demotion or classification or a claim that an employee has been discharged or disciplined without just cause, may be the subject of grievance and dealt with as hereinafter provided;
- (d) to have the right to plan, direct and control the work of the employees and the operations of the Nursing Centre. This includes the right to introduce new and improved methods, facilities, equipment and to control the amount of supervision necessary, combining or splitting up of departments, work schedules, and the increase or reduction of personnel in any particular area or on the whole."

This Article, together with Article 2, headed "Scope and Recognition" are the major clauses embodying the trade-offs arrived at between management rights, union rights and employee rights. Article 2 reads as follows:

"2.01 The Employer recognizes the Union as the sole collective bargaining agent of all employees of Kennedy Lodge Nursing Home at 1400 Kennedy Road in Metropolitan Toronto, save and except Registered Nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week, and students employed during school vacation period.

2.02 The Employer undertakes that he will not enter into any other agreement or contract with those employees for whom the Union has bargaining rights either individually or collectively which will conflict with any of the provisions of this agreement.

2.03 Where the masculine pronoun is used in this agreement, it shall mean and include the feminine pronoun where the context so applies.

26. In our view, Article 6 is sufficiently broad to give the respondent the right to contract out work and there is no express language placing any limits on such right. That being so, the complainant cannot now heard to say that such contracting out strikes at or delimits the rights of the union's recognition.

27. The complainant argues that such contracting out as we have here is in contravention of the Act itself and that the bargain between the parties cannot over-ride the legislation. The complainant relies on the previously quoted paragraphs of the Board's decision in *Westinghouse Canada Limited* in support of its proposition. Our reading of that decision does not support the complainants arguments and, indeed, paragraph 64 (previously quoted) of that decision makes clear that a decision such as the respondent here made is within a permitted area of action without any contravention of the legislation.

28. The complainant also argues that the respondent's failure to bring the matter of economics forward for discussion with the union interfered with the complainant's rights to represent the employees. The Act makes it explicit that once the parties strike a bargain that the terms will be in operation for a minimum period of one year. The Act permits but does not obligate the parties to engage in mid-term negotiations and it, therefore, follows that the failure of the respondent to initiate discussions in the instant case clearly is not a contravention of the Act.

29. For all of the foregoing reasons, the complaint is dismissed.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent.

2. The employer's actions in this case disclose a total disregard for the interests of the union and the employees. Rather than discuss the possibility of contracting out with the union, the employer simply took unilateral action which affected the bargaining rights of the union and the jobs of the employees. This complete failure to consult with the union over such a serious matter indicates that the employer did not take the union seriously as the representative of his employees. This fact is in my view, substantial evidence of anti-union animus.

3. To allow an employer to contract out bargaining work in this high handed fashion is incompatible with the promotion of "harmonious relations between employers and employees" to which the preamble of *The Labour Relations Act* speaks. I would have found that the employer, in attempting to divest itself of its collectively bargained obligations, was in violation of the Act.

0625-80-U United Steelworkers of America, Complainant, v. Knud Simonsen Industries Limited, Respondent.

Discharge for Union Activity – Surrounding circumstances suggesting anti-union motivation – Affirmative evidence establishing business reasons free of anti-union motivation for lay-off

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members C.A. Ballentine and R. D. Joyce.

APPEARANCES: *Marion Tobin, Fortunato Rao and William McGovern for the complainant; M. F. O'Toole, F. U. Jensen and R. Pawlicki for the respondent.*

DECISION OF VICE-CHAIRMAN R. O. MACDOWELL AND BOARD MEMBER R. D. JOYCE; October 3, 1980

1. This is a complaint under section 79 of *The Labour Relations Act*. The complainant union alleges that on June 13, 1980, the grievor, William McGovern, was laid off because of his trade union activity contrary to section 58(a) of the Act.

2. The grievor has worked as a welder in the respondent's stainless steel sheet metal shop since September 18, 1978. In or about the first week of June, he began to solicit support for the union. Within days of commencing this activity he was laid off. The union contends that this layoff was no coincidence, and relies on the timing of the events, as well as a number of facts which it argues support an inference of anti-union animus: when the grievor was laid off, two less senior employees were retained; on June 16, the respondent hired a "fitter-welder" to work in its mild steel shop on a kind of work which the complainant contends the grievor is capable of doing; and the grievor was not offered a job as "helper" when that position became available. The respondent argues that a layoff was justified by declining production, and that the selection of whom to lay off was not motivated by anti-union considerations. With respect to the fitter-welder subsequently hired, the respondent company asserts that he was hired to work in another department on a job which the grievor had never done, and for which, in its view, the grievor did not have equivalent ability.

3. Section 79 (4a) of *The Labour Relations Act* casts upon the respondent the onus to establish that the grievor's layoff was justified, and free from any anti-union considerations. Flemming Jensen, the respondent's production manager, and Richard Pawlicki, the foreman in the sheet metal department, gave evidence in this regard. Neither witness was seriously cross-examined, and, in consequence, their evidence stands largely uncontradicted.

4. The respondent is a manufacturer of custom built food processing equipment, most of which is related to the meat industry. The company prefabricates and installs rendering equipment, conveyor systems, and devices for smoking processed meat. Demand for its output tends to be cyclical and is closely related to the demand for meat products. There is usually a seasonal downturn in later Spring. In 1979, a number of employees had been laid off. In 1980, this seasonal slowdown resulted in the lay-off of the grievor and seven other employees in various departments.

5. In order to "break even", the respondent company requires at least 1,800 hours of production per quarter. In the first quarter of 1980, the company marginally exceeded this level with 1,900 production hours. In the second quarter, however, there were only 1,500

production hours—a drop of 400 hours. Jensen testified that this amounted to the work of about 10 employees. For some weeks the company sought to maintain the level of employment by spreading the available work around, but new orders were not coming in, and after consulting the sales and engineering departments, Jensen concluded that the decline in demand would continue into the fall. Six employees had already quit or been laid off, and this served to absorb some of the impact of the decline in production; but on June 11 it was decided that further layoffs were necessary. It was also decided that the employees from the installation department should be integrated, where possible, into the “in plant” work force. Jensen explained that when production is slow, the company attempts to accommodate, and give priority to the outside installation employees who have skills which the company tries to retain. There is no evidence or contention that this is not the case.

6. As at June 13, 1980, the stainless steel sheet metal shop employed 6 welders, 9 fitter-welders and a pipe-fitter. The pipe fitter with 3 years’ seniority, the grievor (a welder with 21 months’ seniority), and a welder with 8 months’ seniority, were laid off. All of the fitter-welders were retained, as well as a welder with 3 months less seniority than the grievor, and one with 11 months’ less seniority than the grievor. The company also laid off a helper in the machine shop, a helper in the shipping and receiving department, a labourer in the material preparation department, and a fitter-welder and an installation supervisor in the installation department. The uncontradicted evidence is that individuals in the classification “fitter-welder” have a higher degree of skill, ability and responsibility than persons classified as “welder”. In consequence, the grievor must rely on the adverse inference which might be drawn from the retention of 2 welders with less seniority than he has.

7. Both Jensen and Pawlicki testified that they were aware of the grievor’s trade union activity and had known of his preference for trade union representation since the summer of 1979. Discussions of a possible trade union organizing campaign had surfaced periodically since that time. As a result of representations by employees opposed to a union, and the observations of managerial personnel, Jensen formed an impression of the predilections of a number of employees. Jensen told the Board that in months preceding the layoff, McGovern had not been regarded as the most prominent union supporter.

8. When the issue of unionization first arose the company sought legal advice and, as a result of that advice tried to conduct “business as usual” and discourage any managerial involvement in the matter. When a vocal group of union opponents approached management, they were told that the issue of union representation was a matter to be resolved by the employees. Some of these opponents apparently told McGovern that he would be fired for his trade union affiliation; however, none of these individuals gave evidence before the Board, and there is nothing to link their threats to the company, or demonstrate that they were acting on behalf of management when such statements were made. McGovern himself initially testified that there were no discussions of a trade union prior to his own organizing campaign in June 1980; however, on cross-examination, he admitted that a number of employees had approached him in the summer of 1979, and from time to time thereafter, but he had declined to take a leading role until he was satisfied that they were “serious” in their desires.

9. Both Jensen and Pawlicki gave evidence concerning the selection of the employees to be laid off. In Pawlicki’s words: “someone had to go, it was simply a question of who.” Both witnesses testified that they considered both seniority and who, in their view, were “better workers”. The grievor was regarded as an “average” welder (perhaps on the “slow side”), and

although there had been no significant criticism of his performance in the past, both the junior employees retained were regarded as better welders. Unlike the grievor, they had never refused to work piece work, worked overtime as required without comment, and maintained a uniformly high quality of production. The grievor, on the other hand, had not been as compliant and co-operative as the other employees. A number of instances were cited: the refusal on one occasion to work piece work, certain dissatisfaction with the amount of overtime, complaints from fellow employees as to McGovern's performance in various work groups, and McGovern's resignation from the Plant Health and Safety Committee (which McGovern considered to be totally inadequate and which apparently resulted in some friction between him and the company). The company concedes that none of these matters was particularly serious. They did not result in a reprimand or other disciplinary action. However, in the absence of any demonstrably superior welding ability, or any requirement that seniority be the exclusive factor in determining layoffs, these matters were considered.

10. Pawlicki testified that the two junior employees (one by 3 months and one by 11 months) were "better workers" and should be retained. This opinion was conveyed to Jensen who made the final decision. In his evidence, the grievor did not assert that he was a better welder than the two individuals who were retained nor is there any evidence that, in the past, the company has given seniority significant weight, or has on this occasion deviated in any way from its ordinary practice. It may be, of course, that the company's conduct was unfair, and that more weight should have been given to the grievor's seniority, however, the question before this Board is not the fairness of the company's action but whether it was motivated, in whole or in part, by the grievor's trade union activity. It should also be noted that from the Summer of 1979, when the company first learned of the grievor's trade union inclinations, there is no evidence that he has been treated in a discriminatory manner or dealt with adversely in any way. We cannot accept the grievor's testimony that he was expressly told by Pawlicki that he was being laid off because of his union activity.

11. On June 16, (i.e. 3 days after the grievor's layoff) the company hired an employee as a "fitter-welder" in the mild steel shop. McGovern had no experience in this department and admitted that his "mild steel welding card" had expired. The uncontradicted evidence is that the welding process is considerably different and that, as a matter of practice, the company does not interchange welders between the various departments. The company formed the opinion that the grievor would not be able to perform the job immediately without some retraining, whereas the other individual had previously been employed by the company on the job in question. We cannot conclude that the failure to offer the job to the grievor was motivated by anything other than a concern to ensure that the position was filled by the most qualified available person. Similarly, little significance can be attached to the failure by the company to offer the grievor a job as a "helper" in the shipping department. This job materialized because an export clearance had finally arrived in respect of a piece of equipment already prefabricated and destined for Venezuela. The job in question was not only outside the grievor's department but also of an unskilled nature and at a wage rate half that which the grievor had previously earned. No adverse inference can be drawn from failing to offer this job to the grievor. Finally, we note the company's statement to the Board that as soon as production picks up (which was expected to occur by early September) the grievor would be rehired.

12. The resolution of the issue before the Board in this case is difficult. The grievor was laid off within days of launching an organizing campaign on behalf of the complainant union;

moreover, the respondent was aware of the grievor's support for trade unionism, and as we have already pointed out, section 79(4a) of *The Labour Relations Act* casts upon the respondent the obligation of affirmatively demonstrating that its actions are free from any taint of anti-union animus. On the other hand, the respondent came forward with affirmative evidence to demonstrate that a layoff was appropriate, and that a number of individuals, including the grievor, were eventually laid off. Its stated reasons for layoff were not seriously questioned, and are entirely consistent with those of a company which (because its employees are not represented by a trade union) need not give any particular weight to seniority. Of course, if the respondent's employees had been represented by a trade union, it might not have had such a free hand to lay off whomever it chose. Its decision would be subject to review, and its subjective impressions of who was a "good employee" would not have been the determining factor. This however, is not the question before this Board. An employer's decision may be unfair but this does not make it "illegal". In the present case, we are satisfied that the grievor was laid off for the reason which the company stated, and we are not satisfied that he was laid off because of his trade union activity. The complaint is therefore dismissed.

DECISION OF BOARD MEMBER C. A. BALLENTINE:

1. I dissent from the majority decision in this case on the grounds that the respondent company has not discharged the onus placed on it by section 79(4a) of the Act.

2. The majority notes in paragraph 3 that the evidence of the Company's two witnesses stands largely uncontradicted and was not seriously cross-examined by the complainant union. I concede the complainant's case was neither well prepared nor well presented, which is of some concern to me. However, I am satisfied that the Board had enough evidence before it to have found other than it did in this case.

3. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated at paragraph 17:

"The appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive for masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts—*first*, that the reasons given for the discharge are the only reasons and *second*, that these reasons are not tainted by anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act occurred."

It is my opinion that the two elements of the *Barrie Examiner* case have not been met in this instant case.

4. The respondent company claimed through its two witnesses that they were aware of the grievor's union activity for more than 1 year and relied on this point to try and establish no anti-union animus. Mr. McGovern, the grievor, under oath contradicted this evidence and stated that he first contacted the United Steelworkers on May 13, 1980, and that this was the only union that he had ever been in contact with. He may have been approached by employees

and indicated his general support for the trade union movement, but he did not engage in trade union activity until he contacted the Union. The fact that the company did not move against him earlier is, in my view, irrelevant. This evidence of the grievor is confirmed in a letter dated May 13, 1980, from Fortunato Rao, Staff Representative of the Union, to the grievor which stated:

“Enclosed please find fifty membership cards, as you requested. You will need these cards to organize the workers in your plant.

•Please make sure that the employees sign the card, fill in the date and pay \$1.00 membership fee. They also have to print their name on the back of the card with the complete address and postal code.

I wish you luck in your organizing campaign.

Fraternally yours,

Fortunato Rao
Staff Representative”

5. This letter, along with the fact that the grievor was responsible for 24 of the respondent’s employees signing union application cards clearly establishes that the grievor was the Union’s chief organizer.

6. Paragraph 11 of the majority decision deals with the fact that another welder was hired 3 days after the grievor was terminated. I cannot agree with the following statement in this paragraph: “The uncontradicted evidence is that the welding process is considerably different.” The grievor contradicted this in his evidence when he stated that mild steel welding is a function which is fundamental to obtaining a welding licence. I accept the evidence of the grievor that he could have performed the work in the mild steel shop over the evidence of the company’s two witnesses, neither of whom are welders. The fact is the grievor was never given the opportunity to update his welder’s licence in order to perform the work in the mild steel shop, if indeed it was necessary to do so.

7. I do not believe that the majority decision had addressed itself to the factors set out in the *Barrie Examiner* case and certainly the majority have a serious problem distinguishing this case with *The Ontario Educational Communication Authority*, [1976] OLRB Rep. Nov. 721 para. 24:

“The Board in deciding these matters is required to pass judgment on the purity of the employer’s motive *vis-à-vis* *The Labour Relations Act*. These judgments are often difficult ones to make in so far as employers are loathe to incriminate themselves and, in so far as trade unions will avail themselves to the protections found in the Act in situations where legitimate terminations are coincidental with trade union organization. The judgments, therefore, require an incisive examination of the evidence and a preparedness by the Board to draw inference as to the motive for the impugned activity based on the circumstantial evidence before it. The Board in assessing the employer’s explanation, must look to all of the

circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, *the employment history of the grievor and his involvement in the trade union activity, unusual or atypical conduct by the employer following upon knowledge of trade union activity, the timing of the termination or other alleged unlawful activity vis-à-vis the employer's knowledge of trade union organization and of course the credibility of the witnesses.*" [emphasis added]

8. Taking into consideration the principles set out in the above stated case, the following are the relevant facts in this instant case:

- (a) Mr. McGovern was a welder, employed for one year and eight months (20 months) and during this period was never reprimanded for work practice;
- (b) He called the United Steelworkers Union, May 13, 1980, the first time he had made contact with a union;
- (c) On Friday, May 30, 1980 the grievor, along with three other employees, met with a union staff representative, all four signed union cards and the grievor was given a letter along with 50 union application forms;
- (d) Under cross-examination by the company's counsel the grievor stated that he was responsible for collecting a total of 24 application cards;
- (e) The grievor gave evidence that during the week of June 9, 1980, several employees advised him that the company was aware of his union activities and he would be fired;
- (f) On Friday, June 13, 1980, only 10 working days after the grievor had received the letter of instructions and 50 applications forms and had signed up 24 employees, he was fired;
- (g) The grievor in evidence stated that after Mr. Pawlicki, the foreman, gave him the reason for the layoff, he asked Mr. Pawlicki "Is not the real reason because of my union activity?" He said Mr. Pawlicki took a quick look around and answered, "yes". (Mr. Pawlicki denied that he made this statement);
- (h) After the grievor was discharged, two less senior welder employees were retained in the same department (one with 16 months' service the other with 6 months' service) and three days later the company hired another welder for the mild steel shop.

9. Considering the circumstantial evidence alone, in this case, it is comparable to *The Ontario Educational Communications Authority* case. On the balance of probabilities it is my

finding that the respondent company has violated *The Labour Relations Act* and did discharge the grievor, William McGovern, because of union activity.

10. My decision is that the grievor should be reinstated with full compensation dating back to June 13, 1980.

1328-80-R United Steelworkers of America, Applicant, v. **Lyman Tube**, Division of Jannock Tube Limited, Respondent, v. Group of Employees, Objectors.

Petition – Evidence relating to entire period of circulation missing – Foreman signing petition – Petition rejected

BEFORE: R. D. Howe, Vice-Chairman, and Board Members T. G. Armstrong and S. H. Lewis.

APPEARANCES: *Gerry Reeds and Bill Davis for the applicant; Allen V. Craig and Doug Sinclair for the respondent; Roy W. Rogers for the objectors.*

DECISION OF THE BOARD; October 24, 1980

1. This is an application for certification.

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5. In support of this application the trade union filed documentary evidence of membership on behalf of a number of employees. This documentary evidence is correct in all respects, is supported by a properly completed (Form 8) Declaration Concerning Membership Documents and demonstrates a level of membership in excess of that required for certification without recourse to a representation vote.

6. There was also filed in this matter, in timely fashion, a written statement (hereinafter referred to as the “petition”) expressing opposition to the applicant trade union in the following terms:

“We the undersigned wish to withdraw our application to have the United Steel Workers act as our Bargaining Unit with Lyman Tube Div of Jannock Tube”.

7. As indicated above, in the absence of the petition, which was signed by ten persons, the applicant would be entitled to be certified without a representation vote. However, the overlap between the persons who signed membership cards in the applicant and the persons who signed the petition is sufficient that the Board would generally exercise its discretion to direct a representation vote if the Board were satisfied of the voluntariness of the

petition. Accordingly, the Board conducted its usual inquiry into the origination and circulation of the petition.

8. The petition was prepared by Roy W. Rogers who is employed by the respondent as a truck driver. Mr. Rogers testified that he decided to prepare a petition after reading the “green sheet” (Form 5 Notice to Employees of Application for Certification and of Hearing). He drafted the petition with the assistance of his wife and personally witnessed seven of the ten signatures on it, namely numbers 1, 2, 3, 4, 8, 9 and 10. After the first four persons had signed it, Mr. Rogers gave the petition to number 5 at approximately 7:00 p.m. on October 6, 1980. Number 5 returned the petition to Mr. Rogers approximately two hours later with three additional signatures on it – numbers 5, 6 and 7. One of these signatures, namely, number 7, was that of a foreman.

9. As indicated earlier in this decision, foremen are excluded from the bargaining unit agreed upon by the parties. This exclusion is consistent with the standard practice of this Board concerning bargaining units of this type, by which persons classified as foremen are generally excluded from the unit as the lowest level of management. In the absence of evidence to the contrary, the Board presumes that the parties in the instant case agreed that foremen should be excluded from the bargaining unit because they exercise managerial functions within the meaning of section 1(3)(b) of the Act.

10. There was no evidence before the Board concerning the circumstances under which the petition was signed by numbers 5, 6 and 7; Mr. Rogers was the only person who testified concerning the circulation of the petition and he was not present when those three persons signed it. After the petition was returned to Mr. Rogers, he obtained the three remaining signatures (numbers 8, 9 and 10) and returned the petition to number 5 for delivery to the Board.

11. The legal basis and effect of petitions and the Board’s practice concerning such documents were explained as follows in *Peacock Lumber Limited*, [1979] OLRB Rep. May 423:

“7. Neither ‘statements of desire’ nor ‘petitions’ are mentioned in The Labour Relations Act itself, but they do appear to be contemplated by Rule 48 of the Rules of Practice (R.R.O. 1970 Reg. 551 as amended.) The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petition is voluntary, complies with Rule 48, and contains the signatures of a sufficient number of persons who have previously signed membership cards, that there is some doubt whether the union’s ‘members’ continue to support its certification. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043 (at p. 1046) the Board explained the effect of a petition in the following way:

16. Having regard to the statutory definition of ‘member’ and the provisions concerning membership evidence, the Board is satisfied that more than fifty-five per cent of the employees in bargaining unit #1 are ‘members’ of the union, and that therefore the union may be certified without a representation vote. However, section 7(2) of the

Act gives the Board the discretion to order a representation vote where it considers it advisable to do so. The practice of the Board is to exercise this discretion in favour of ordering a representation vote where a sufficient number of the employees, who have been found to be union 'members', subsequently indicate that they no longer wish to support the union. When faced with this 'change of heart', the Board will order a representation vote in order to satisfy itself that, in addition to meeting the statutory membership requirements, the union continues to enjoy the support of its members.

17. The 'change of heart' will often take the form of a petition or statement of desire indicating that the signatures no longer wish to support the union. There is no specific form required for such petition, but it must comply with the requirements of Rule 48, and clearly indicate the member's change of heart. Typically, the petition in opposition to the union is signed by members who have indicated their support only a few days before. Moreover, while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. In these circumstances an employee may sign a petition out of fear that his refusal to do so will be made known to his employer rather than a genuine opposition to the union. It is for this reason that the Board undertakes the enquiry into the origination and circulation of the petition contemplated by Rule 48(5), in order to satisfy itself that the statement in opposition to the union is truly voluntary.

18. The statement of desire filed in opposition to the application bears a sufficient number of signatures which correspond to the signatures of persons in the full-time bargaining unit who signed membership cards that, if proven to be a voluntary expression, will cause the Board to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote. . .

8. Rule 48 casts upon the petitioners an onus to call evidence as prescribed by 48(5), and to generally demonstrate that the petition is voluntary. The Board must be satisfied that when the members signed the petition, they were evidencing a genuine change of heart and were not motivated by a concern that their failure to sign would be communicated to the employer, or could result in reprisals. It must be clear that the circulation of a petition is free from the actual, or perceived, influence of management. In this respect the Board takes the same approach as it does with union membership evidence. (See, for example, *Veres Wire*, [1976] OLRB Rep. July 337 where the involvement in a union organizing campaign of a person reasonably perceived to be managerial, prompted the Board to reject the union's membership evidence because it was not satisfied that the 'members' had signed voluntarily.) In *Radio Shack*, *supra*, the Board commented:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the ‘sudden change of heart’ by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

‘In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influence, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.’

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign or not to sign it. (See *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813 and the cases cited therein.)”

12. If the custody of a petition cannot be substantially documented by direct evidence throughout its period of circulation, the Board will not attach any weight to it (see *Groves Park Lodge*, [1979] OLRB Rep. Sept. 871; *J. A. K. Electrical Contractors Limited*, [1977] OLRB Rep. May 275; *Formosa Spring Brewery*, [1974] OLRB Rep. Sept. 604 and *Vered and Harvey Company Limited*, [1971] OLRB Rep. Nov. 736).

13. It is clear from his candid and credible testimony that Mr. Rogers sincerely attempted to circulate the petition in such a manner that each employee would feel free to sign or re-

frain from signing it. However, having regard to the fact that the petition clearly fell into the hands of a foreman during the period of its circulation in which it was out of Mr. Rogers' hands and concerning which no evidence was adduced, the Board, in accordance with the jurisprudence set forth above, is not prepared to attach any weight to the petition.

14. This Board generally rejects the signature of any foreman or other member of management which appears on a petition, together with all signatures that follow it (see *Hoffman Concrete Products Ltd.*, [1976] OLRB Rep. Feb. 35; *Universal Cooler*, [1967] OLRB Rep. Sept. 546; *Rivard Cleaners Ltd.*, [1966] OLRB Rep. April 19; *Sudbury Public School Board*, [1963] OLRB Rep. Oct. 357 and *Pocock Dairy Ltd.*, [1961] OLRB Rep. Mar. 443). Accordingly, quite apart from the gap in the evidence concerning the circulation of the petition, the Board would in any event disregard signatures 7, 8, 9 and 10. Without those signatures, there is not sufficient overlap between the remaining signatures on the petition and the persons who signed membership cards to cause the Board to doubt that the members of the applicant continue to support its certification. Thus, even if the lack of evidence concerning the period of circulation of the petition during which signatures 5, 6 and 7 were obtained did not cause the Board to attach no weight to the petition, the Board would still decline to order a representation vote in the exercise of its discretion under section 7(2) in the circumstances of this case.

15. The burden of proving that, on the balance of probabilities, the petition represents a voluntary statement of desire on the part of the employees lies upon the objectors (see *Leamington Vegetables Growers Co-Operative Limited*, [1974] OLRB Rep. June 402). Having regard to all the evidence before it and the submissions of the parties, the Board finds that the objectors have not discharged that burden and that the petition in the present case does not cast doubt upon the continued support of the members of the applicant for its certification.

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17. A certificate will issue to the applicant.

0868-80-U The Master Insulators' Association of Ontario Inc.,
 Complainant, v. International Association of Heat and Frost Insulators
 and Asbestos Workers, Local 95, Respondent, v. Catalytic Enterprises
 Limited, Intervener #1, v. Consolidated Maintenance Services Limited,
 Intervener #2, v. General Presidents' Committee for Plant Maintenance
 in Canada, Intervener #3.

Collective Agreement – Construction Industry – Provincial collective agreement in force
 under construction industry provisions – Parties also executing maintenance agreement – Whether
 work performed under maintenance agreement actually constructionwork – Board distinguishing
 between maintenance and construction

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and F. W.
 Murray.

APPEARANCES: *Robin B. Cumine, Q.C., J. R. Blandford and Herb Near for the com-
 plainant; S. B. D. Wahl and J. Duffy for the respondent; R. C. Filion, P. Thorup and S. M.
 Smillie for intervenor #1; James B. Noonan, Susan Bisset and George E. Temple for intervenor
 #2; and H. M. Pollit and R. J. Watson for intervenor #3.*

DECISION OF THE BOARD; October 23, 1980

1. The complainant had complained under section 79 of *The Labour Relations Act* that it has been dealt with by the respondent contrary to the provisions of section 134a(1) of the Act and requests that the Board order the respondent and its officers and members to cease and desist from acting in breach of section 134a(1).

2. The complainant has alleged that on and after June 23, 1980, and continuing to the date of the filing of this complaint on July 23, 1980, it was dealt with by the respondent and its officers and members contrary to the provisions of section 134a(1) in that the respondent and its officers and members on behalf of the respondent having called, authorized and commenced a lawful strike concerning bargaining in connection with the renewal of the provincial collective agreement between the parties the respondent failed to call or authorize such strike in respect of all of the employees represented by it in the industrial, commercial and institutional sector and have continued to supply men and services to certain employers.

3. In paragraph 3(a) of this complaint, the complainant has completed the statement, "name of any other person, trade union, council of trade unions or employers' organization that may be affected by the complaint" by supplying the following names on a Schedule "A":

Dewar Insulations Inc.
 Johns-Manville Canada Inc.
 Lewis Insulations Services Limited
 Per-fec-tion Insulations Ltd.
 Catalytic Construction and
 EPI Incorporated.

In paragraph 7 of its complaint, the complainant has completed the statement, "Other relevant statements" by adding a Schedule "B" to its reply as follows:

1. The Applicant [sic] states that the Respondent called authorized and commenced on or about June 23, 1980, a lawful strike in connection with collective bargaining for the renewal of the Provincial Collective Agreement.
2. The Respondent withdrew the services of its members from most of the members of the Applicant [sic] and has continued to withhold such services. A new collective agreement has not been reached.
3. The Respondent has, however, continued to authorize its members to supply services between the 23rd day of June, 1980 and the present, at inter alia, the following job sites to the following employers shown on Schedule "A":

<u>JOB SITE</u>	<u>EMPLOYER</u>
(a) Stelco Plant, Hamilton, Ontario	Dewar Insulations Inc. Johns-Manville Canada Inc. Lewis Insulations Services Ltd.
(b) General Motors Plant, St. Catharines, Ontario	Lewis Insulations Services Ltd.
(c) F. W. Fearman Co. Ltd., 821 Appleby Line, Burlington, Ontario.	Per-fec-tion Insulations Ltd.
(d) Sunoco Incorporated, Sinclair Parkway, Sarnia, Ontario.	Catalytic Construction
(e) Shell Oil, Corunna, Ontario.	Catalytic Construction
(f) Stelco Plant, Nanticoke, Ontario.	EPI Incorporated

4. The Applicant [sic] may ask the Board to make certain determinations under the provisions of Section 135 in connection with this application [sic].

5. The Applicant [sic] requests that the Board abridge the time limits in order to obtain an early hearing in connection with this matter.

During a hearing on August 7, 1980, the Board considered certain preliminary matters of a procedural nature (see the decision of the Board in this matter dated August 22, 1980, which

sets forth written reasons for an oral ruling which was made on August 7, 1980) and it was understood and agreed by all parties that references in the complaint which named "Catalytic Construction" referred to "Catalytic Enterprises Limited".

4. Section 134a(1) and 135 of the Act state:

134a-(1) Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106, and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.

135. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106.

5. The Board heard extensive evidence with respect to the nature of the work referred to in the complaint. In order for the complainant to be in a position to request the Board to exercise its powers under section 79, it is necessary for the complainant to establish that work which has been referred to in the complaint is work within the industrial, commercial and institutional sector of the construction industry and that such work was or is being performed contrary to the provisions of section 134a(1). There is no dispute that the complainant, being a designated employer bargaining agency pursuant to section 127 of the Act, and the respondent and the International Association of Heat and Frost Insulators and Asbestos Workers (the "International"), being a designated employee bargaining agency pursuant to section 127 of the Act, are parties to a provincial collective agreement applicable to the industrial, commercial and institutional sector of the construction industry. In addition, there is no dispute that this collective agreement was effective from May 14, 1979, until April 30, 1980, and that on June 23, 1980, the respondent was in a position to engage in a lawful strike with respect to that provincial collective agreement. In fact, the respondent did call or authorize a strike with respect to the provincial collective agreement on June 23, 1980. One of the questions to be answered in this complaint is whether such a strike is in violation of section 134a(1). In order to answer this question it is necessary for the Board to determine whether a document entitled "Maintenance Addendum as per Article #1.02 of Collective Agreement dated May 14, 1979" (the "maintenance agreement") between the complainant and the respondent and the International is merely an addendum to the provincial collective agreement in the industrial, commercial and institutional sector of the construction industry and which expired on April 30, 1980, or whether it is a separate collective agreement with respect to maintenance work and outside the construction industry. It is the complainant's contention that the maintenance agreement is merely an addendum to the provincial collective agreement in the industrial, commercial and institutional sector of the construction industry. On the other hand, the respondent takes the position that the maintenance agreement is a separate collective agreement with respect to maintenance work. Moreover, the respondent

has requested the appointment of a conciliation officer with respect to the maintenance agreement. This request is opposed by the complainant (see Board File No. 0875-80-M). Moreover, the respondent has entered into several collective agreements with employers in the same form as the maintenance agreement. It is the complainant's position that work is being performed under the maintenance agreement which is in fact work in the industrial, commercial and institutional sector of the construction industry. It is the position of the complainant that such maintenance agreements are in violation of the provisions of section 133(2) of the Act and are null and void. Section 133 provides:

133-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 127 and 132, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 1, and any collective agreement or other arrangement that does not comply with subsection 1 is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day on April calculated biennially from the 30th day of April, 1978.

6. Intervener #1 and intervener #2 are parties to a series of collective agreements with intervener #3. These collective agreements are commonly referred to as General Presidents' agreements and are formally entitled "Project Agreement for Maintenance by Contract in Canada". These agreements are in force for one year and are between parties, such as intervener #1 and intervener #2 and twelve international trade unions in the construction industry. The International is included in these twelve international trade unions. These agreements are signed with respect to individual sites and the rates of pay are based upon local rates. In order to be a signatory to the General Presidents' agreement, an employer is required to fulfil two conditions. Firstly, the employer is required to employ not less than four trades on a site and have a collective bargaining relationship with such trades in the region where the site is located. Secondly, the employer is required to have contracted to perform industrial maintenance work of at least one year's duration. General Presidents' agreements have been in existence and have been applied from coast to coast since 1952. It is the position of the complainant that work in the industrial, commercial and institutional sector of the construction industry is being performed under the General Presidents' agreements in Ontario by Intervener #1, Intervener #2, EPI Incorporated and Erie Insulations Limited. It is the position of the complainant that such plant maintenance agreements in so far as they purport to cover work in the industrial, commercial and institutional sector of the construction industry are in violation of the provisions of section 133(2) and are null and void.

7. This complaint has been framed so as to include the various types of arrangements and conditions under which insulation work is being performed in Ontario and is in the nature

of a test case. In this complaint the complainant seeks to establish the work which is being performed as maintenance work is work which falls within the meaning of "construction industry" as defined in section 1(1)(f) of the Act and that such work is within the industrial, commercial and institutional sector of the construction industry. The effect of such a finding would be to invalidate any purported collective agreement in the industrial, commercial and institutional sector of the construction industry with respect to insulation work other than the one between the employer bargaining agency and the employee bargaining agency referred to in paragraph five and to establish that the respondent is in violation of section 134a(1) of the Act.

8. Before considering the evidence and argument which was addressed to the Board, it is appropriate to set forth the provisions of the various collective agreements and alleged collective agreements which are in issue before the Board.

9. The provincial collective agreement was effective from May 14, 1979, until April 30, 1980, and was between the complainant, the employer bargaining agency, and the respondent and the International, the employee bargaining agency. The provincial collective agreement contains the following preamble and articles:

WHEREAS the Association, on behalf of all Employers whose employees are represented for collective bargaining by the Union and the Union have bargained together collectively in an effort to reach a collective agreement applicable to the Industrial, Commercial and Institutional sector of the Construction Industry pursuant to the provisions of *The Labour Relations Act*, R.S.O. 1970, c. 232, as amended;

AND WHEREAS the Association, on behalf of each Employer who is a member of the Association and any new Employer becoming a member of the Association subsequent to the date hereof, and the Union have bargained together collectively in an effort to reach a collective agreement encompassing all sectors of the Construction Industry save and except the Electrical Power Systems sector pursuant to the provisions of *The Labour Relations Act*;

AND WHEREAS the parties have agreed to enter into a Collective Agreement to govern wages, hours and working conditions; to establish fair and peaceful adjustments to all disputes which may arise; to prevent strikes, walk-outs and lock-outs and to eliminate waste, expense, unnecessary overtime and unnecessary delays in the performance of work;

AND WHEREAS the purpose of the Collective Agreement is to govern the wages and working conditions applicable to all work performed by the Employees in the application of those types of insulation which are within the jurisdiction of the Union in the Province of Ontario, provided, however, that under no circumstances shall this Agreement apply to work which is performed by employees of any Employer represented by the Association in that Employer's plant and not on a construction site.

NOW THEREFORE THIS AGREEMENT WITNESSETH:

ARTICLE I- RECOGNITION AND SCOPE

1.01

“Employers” as used herein means all Employers whose employees are represented for collective bargaining by the International Association of Heat and Frost Insulators and Asbestos Workers and Local Union 95 and Local Union 58 thereof with respect to bargaining rights in the Industrial, Commercial and Institutional sector of the Construction Industry and, in addition, means members of the Association and new Employers becoming members of the Association subsequent to the date hereof, including such other Employers as may become bound to the provisions of this Agreement pursuant to either Article 14 hereof, with respect to all sectors of the Construction Industry save and except E.P.S.C.A. or pursuant to the provisions of *The Labour Relations Act*.

1.02

“Employees” as used herein shall mean and include all mechanics, improvers and/or apprentices who are members of the Union. This agreement covers the rates of pay, rules and working conditions of all mechanics and improvers of that work traditionally and regularly performed by this craft for the employers signatory to this Agreement at the site of construction, in performance of the preparation, distribution, fabrication, alteration, application, erection, assembling, molding, spraying, pouring, mixing, hanging, adjusting, repairing, dismantling, reconditioning, maintenance, finishing and/or weatherproofing, of cold or hot thermal insulation with such materials as may be specified when these materials are to be installed for thermal purposes in voids, or on other piping, fittings, valves, boilers, ducts, flues, tanks, vats, equipment, or on any hot or cold surface for the purpose of thermal control and such other work as may be awarded the Union pursuant to trade jurisdictional award.

1.02(a)

Maintenance as specified in Clause 1.02 may, if the employer has signed a Maintenance Addendum, which is in full force, be performed under the terms of the said Maintenance Addendum and such maintenance work shall be subject to all terms and conditions of the “Maintenance Addendum”.

1.03(a)

All Employers whose employees are represented for collective bargaining by the Union recognize the Union as the sole bargaining agent for their employee performing work covered by the Agreement within the

Industrial, Commercial and Institutional sector of the Construction Industry.

1.03(b)

All Employers who are members of the Association and new Employers becoming members of the Association subsequent to the date hereof recognize the Union as the sole bargaining agent for their employees performing work covered by this Agreement in all sectors of the Construction Industry, save and except E.P.S.C.A.

1.03(c)

This agreement and any Maintenance Addendum thereunder shall be the only Agreement signed or in effect between the Association, members of the Association, new Employers becoming members of the Association subsequent to the date hereof and employer signatories to a collective agreement which acknowledges that the said Employer is bound by this Agreement and incorporates by reference the terms and conditions of this Agreement and all other Employers bound by the Agreement and the Union (other than E.P.S.C.A., Specialty and Residential Groups).

The Union agrees that it will not sign any other Agreement or Maintenance Addendum with any other employer or an Association representing employers, on terms more favourable to such employers or Association than those contained in this Agreement or any Maintenance Addendum thereunder.

10. The maintenance agreement was effective from May 14, 1979, until June 30, 1980, and was between the complainant on the one hand and the respondent and the International on the other hand. The maintenance agreement states on its cover, "Maintenance Addendum as per Article #1.02 of Collective Agreement dated May 14th, 1979" and contains the following preamble and articles:

WHEREAS the Employers are engaged from time to time in the business of plant service, repair and renovation work (as defined in Article 2 herein), for members of the "Owner-Client Council of Ontario", and this work is of importance to the Union and it being recognized there is an essential difference in the conditions required to perform this type of work, the Union and the Association wish to enter into this agreement for their mutual benefit covering work of this nature.

WHEREAS the Union have in their Membership throughout Ontario Members competent and qualified to perform the work of the Employers.

WHEREAS the Employers have employed and now employ Members of the Union on service, repair and renovation work recognized by the Unions of the AFL-CIO as being within the jurisdiction of said Union.

WHEREAS in order to insure relative equity and uniform interpretation and application, the Union wishes to negotiate and administer said collective agreement in concert with the Employers.

WHEREAS the Parties of this agreement agree, that due to the particular nature of the work covered by this agreement, there shall be no strikes or lockouts during the life of this agreement, and provisions shall be made to achieve this end.

IT IS THEREFORE AGREED by the Parties hereto, in consideration of the mutual promises and covenants contained herein that the agreement be made as follows:

ARTICLE 1 RECOGNITION

- 1.01 The Employer recognizes the Union as the exclusive bargaining agent for all employees engaged in service, repair and renovation work within the Province of Ontario, as defined in Article 1.02 of the collective agreement dated May 14th, 1979.

ARTICLE 2 SCOPE OF AGREEMENT

- 2.01 The scope of this agreement shall cover all work of a service, repair, renovation and revamp nature, including shutdowns and turn-arounds in an existing facility assigned by an Owner-Client to an Employer covered by the terms of this Agreement.
- 2.02 The scope of this agreement shall not apply to work performed by the Employer of a new construction nature which is work required to erect new facilities in which event the work shall be performed in accordance with the provisions of the collective agreement dated May 14th, 1979.
- 2.03 The Union and the Employers understand that the Owner-Client, may at his discretion, choose to perform or directly subcontract work for any part or parts of the work necessary in his plant.
- 2.04 No Contractor covered by the terms of this agreement will subcontract work to a Contractor who is not in contractual relations with the Union.

11. The collective agreements with individual or independent employers are between the employer on the one hand and the respondent and the International on the other hand. These collective agreements are identical with one and the other and are in short form. The short form agreements are each dated May 14, 1979, and provide:

WHEREAS the Union is entitled to represent the employees of the Employer within the bargaining unit hereinafter described.

AND WHEREAS the Union and the Employer desire to enter into a Collective Agreement covering all work of a service, repair, renovation and revamp nature, including shut-downs and turn-arounds in existing facilities and not applicable to new construction required to erect new facilities.

AND WHEREAS the Union and the Master Insulators' Association of Ontario, Incorporated, have entered into a collective agreement expressed to be applicable to the work above described and applicable to the employees within the bargaining unit hereinafter described, effective as of May 14th, 1979 until June 30, 1980 ("the Collective Agreement").

The Employer and the Union hereby acknowledge and agree as follows:

1. The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all employees, Journeymen and Apprentice Insulators and Asbestos Workers in the employ of the Employer in the Province of Ontario, performing work of a service, repair, renovation and revamp nature, including shut-downs and turn-arounds in an existing facility. The scope of this Agreement shall not apply to work performed by the Employer of a new construction nature which is work required to erect new facilities;

2. Except as may be otherwise provided for herein, the Employer and the Union hereby acknowledge and agree to recognize, observe and be bound by all the terms, conditions, provisions (both monetary and non-monetary) and appendices and schedules set forth and forming part of the Collective Agreement and including any renewals thereof, as if the same was made between the Union and the Employer. The Employer acknowledges that it is in possession of and is familiar with all the terms, conditions and provisions of the Collective Agreement.

3. In the event of any of the terms, conditions, provisions (both monetary and non-monetary) and appendices and schedules of the Collective Agreement are in any way altered, added to or amended by the parties thereto, then the parties to this Memorandum of Agreement shall be bound by the same for all work covered by the Collective Agreement as if original parties thereto and the Employer shall execute such documents as may be presented to it by the Union in order to confirm and acknowledge such intention.

IN WITNESS WHEREOF each of the parties hereto has caused this Memorandum of Agreement to be signed by its duly authorized representatives as of the date and year first above written.

12. The General Presidents' agreements are effective from April 30 to April 29 of the succeeding year and are entitled "Project Agreement for Maintenance by Contract in Canada". Under the title there appears the name and location of the client for whom the

employer who is a party to the collective agreement is performing the work. The collective agreements are virtually identical in form and one example provides:

PROJECT AGREEMENT FOR MAINTENANCE
BY CONTRACT IN CANADA

This Agreement is entered into this 30th day of April, 1978 by and between CATALYTIC ENTERPRISES LIMITED of Sarnia, Ontario (hereinafter referred to as the "Company"), and those INTERNATIONAL UNIONS OF THE AFL-CIO listed hereunder (hereinafter referred to as the "Unions"), for the purpose of maintenance, repair and renovation work for SHELL CANADA LIMITED located at Oakville, Ontario.

The Unions are composed of the following International Unions of the AFL-CIO:

International Association of Heat and Frost Insulators and *Asbestos Workers*

International Brotherhood of *Boilermakers*, Iron Ship Builders, Blacksmiths, Forgers and Helpers

United Brotherhood of *Carpenters* and Joiners of America

Operative Plasterers and *Cement Masons* International Association

International Brotherhood of *Electrical Workers*

International Association of Bridge, Structural and Ornamental *Iron Workers*

Labourers International Union of North America

International Union of *Operating Engineers*

International Brotherhood of *Painters* and Allied Trades

United Association of Journeymen and Apprentices of the Plumbing and *Pipefitting* Industry of the United States and Canada

Sheet Metal Workers International Association

International Brotherhood of *Teamsters*, Chauffeurs, Warehousemen and Helpers

Whereas the Company is engaged in the business of plant maintenance, repair and renovations (as defined in Article 4.000) with mis-

cellaneous industries, and this work is of importance to the Unions herein listed, and it being recognized there is an essential difference in the conditions required to perform this type of work, the Unions herein listed with the Company wish to enter into an agreement for their mutual benefit covering work of this nature.

Whereas the Unions have in their membership throughout the area members competent and qualified to perform the work of the Company.

Whereas the Company has employed and now employs members of the Unions on maintenance, repair and renovation work recognized by the Unions of the AFL-CIO as being within the jurisdiction of said Unions.

Whereas, in order to insure relative equity and uniform interpretation and application, the Unions, through the duly appointed and constituted General Presidents' Committee for maintenance in Canada wish to negotiate and administer the said Collective Agreement in concert, each with the other, and all with the Company.

Whereas, the Company and the Unions desire to mutually establish hours of work and working conditions for the workmen on an area basis to the end that satisfactory conditions and harmonious relations will continue to exist for the benefit of both parties to this Agreement.

Whereas the Company and the Unions agree that, due to the particular nature of the work covered by this Agreement, there shall be no lockouts or strikes during the life of the Agreement, and provisions must be made to achieve this end.

Whereas, it is recognized that all employees covered by this Agreement shall have the protection of all existing Federal, Provincial and Local laws applicable to employees in general, and provisions in this Agreement which are in contravention of any Federal, Provincial, or Municipal regulation or laws affecting all or part of the limits covered by this Agreement shall be suspended in operation within the limits to which such law or regulation is in effect. Such suspension shall not affect the operation of any such provisions covered by this Agreement, to which the law or regulation is not applicable. Nor shall it affect the operations of the remainder of the provisions of the Agreement within the limits to which law or regulation is applicable.

It is, therefore, agreed by the undersigned Company and the undersigned Unions that in consideration of the mutual promises and covenants contained herein, the project agreement be made as follows:

ARTICLE 1.000 – RECOGNITION

1.100 The bargaining unit under this Agreement shall comprise all

employees of the Company, coming under the jurisdiction of the Unions signatory to this Agreement, now employed and employed in the future for maintenance, repair and renovation work at the Owner's plant site.

1.200 *The Company and the Unions*

- 1.201 Agree that the jurisdiction recognized herein for each Union shall be the jurisdiction recognized by the AFL-CIO, provided, however, that if they or the Unions are unable to agree upon the Union which is to have jurisdiction over any group of employees, the Company will recognize one as having jurisdiction until such time as the Claimant Unions agree upon another and provided further that work considered within the jurisdiction of any Union which is not represented by the Unions listed herein may be assigned by the Company to the jurisdiction of the most appropriate Union.
- 1.202 Recognize the Unions as herein duly constituted for the purpose of bargaining collectively and administering this Agreement for the members of their respective Unions.
- 1.203 Agree to bargain collectively with the Unions and to be governed by the terms of this Agreement and by all lawful settlements of disputes and grievances made pursuant thereto.

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ARTICLE 3.000 – SCOPE OF WORK

- 3.100 The scope of this Agreement covers all work of a maintenance, repair and renovation nature, assigned by the Owner to the Company and performed by the employees of the Company covered by this Agreement, within the limits of the Owner's plant site.
- 3.200 The scope of this Agreement does not cover work performed by the Company of a new construction nature which is work required to erect new facilities in which event the work shall be done in accordance with existing building construction agreements.
- 3.300 The Unions and the Company understand that the Owner, may, at his discretion, choose to perform or directly subcon-

tract work for any part of parts of the work necessary in his plant.

ARTICLE 4.000 – DEFINITIONS

- 4.100 Maintenance shall be work performed for the repair, renovation, revamp and upkeep of property, machinery and equipment within the limits of the plant property.
- 4.200 All work performed by the Company on existing equipment and machinery, including all associated work in a given plant, shall be maintenance. This shall include replacement of existing individual items of machinery and equipment with new units, including all associated work. It is understood that this concept would not include replacement of an entire process system installation in a plant in order to increase production.
- 4.300 Addition of spare machinery or equipment may be done under the maintenance agreement provided it is for debottlenecking purposes. Example: There are two existing pumps. Both pumps are required to run at all time to maintain full production. A spare may be added for the purpose of having one pump for maintenance.
- 4.400 Changes to existing units for reasons of feed stock changes or fuel changes shall be maintenance.
- 4.500 The administration and interpretation of this article is the responsibility and prerogative of the General Presidents' Committee for Contract Maintenance in Canada.
- 4.600 "Long-Term Maintenance" shall be the continuing work performed of a maintenance, repair renovation character within the limits of the plant property exclusive of "Short-Term Maintenance" defined below.
- 4.700 "Short-Term Maintenance" work means work that is terminated within 65 available days of work.
- 4.800 The word, "repair" used within the terms of this Agreement and in connection with maintenance, is work requested to restore by replacement or by revamp of parts of existing facilities operating conditions.
- 4.900 The word, "renovation", used within the terms of this Agreement and in connection with maintenance, is work required to change by replacement or by "revamp" of parts of existing facilities to efficient operating conditions.

Unlike the earlier agreements referred to in paragraph nine, ten and eleven, the General Presidents' agreements are multi-trade collective agreements.

13. Members of the complainant have been engaged in performing work on the premises of Stelco in Hamilton, General Motors in St. Catharines and F. W. Fearman Co. Ltd. in Burlington both prior to the subsequent to June 23, 1980. The work which was performed for Stelco at Hamilton was performed by Dewar Insulations Inc. ("Dewar"), Johns-Manville Canada Inc. ("Johns-Manville") and Lewis Insulations Services Limited ("Lewis") pursuant to standard form agreements to perform "General Insulation Work - Construction and Maintenance". These standard form agreements set forth the general conditions under which work is to be performed and do not in themselves guarantee that any work will be awarded to Dewar, Johns-Manville and Lewis. The actual work is awarded on the basis of purchase orders which specifically refer to the work to be performed and which generally stipulate that the work should not exceed two thousand dollars in value.

14. Per-fec-tion Insulations Ltd. ("Per-fec-tion") was engaged in performing work on the premises of F. W. Fearman Co. Ltd. ("Fearman") after June 23, 1980. This work was performed in connection with the addition of one hundred thousand square feet to an existing facility. Fearman installed new steam, compressed air and refrigeration capacity and added two new boilers. In addition, Fearman installed one hundred feet of new piping and connected it into an existing steam line. Two refrigeration units were relocated during the expansion of Fearman's plant. As a part of this programme of expansion and relocation, Per-fec-tion's employees replaced existing insulation and applied new insulation. After June 23, 1980, following the advice of the respondent's steward, Frank Burns, and Per-fec-tion's superintendent that this work was maintenance rather than construction, such work was performed by employees of Pec-fec-tion who were members of the respondent.

15. Dewar Insulations Inc. ("Dewar") performed insulation work of a routine nature on various systems at Stelco's plant in Hamilton both before and after June 23, 1980. Dewar's contract with Stelco does not provide a definition of maintenance and construction. Until 1980 Dewar never differentiated between maintenance and construction and always charged construction rates because it had never signed a maintenance agreement with the respondent. However, after June 23, 1980, Dewar commenced using maintenance rates and so advised Stelco. Gabriel Larocque, Dewar's superintendent at Stelco, testified that Dewar's work at Stelco did not include new construction work. The work performed by Dewar at Stelco after June 23, 1980, consisted of insulating damaged furnaces, insulating steam lines, new emergency showers and minor work in a change house. In general terms, this work was performed in order to maintain or sustain production through an existing operating system. In some cases, however, the system is shut down to allow the insulators to work on it.

16. Lewis Insulations Services Ltd. ("Lewis") performed insulation work on the premises of Stelco's plant in Hamilton both before and after June 23, 1980, and after June 23, 1980, at General Motors' plant in St. Catharines. At Stelco's plant in Hamilton, Lewis was engaged in insulating pipes and steam lines during the shutdown of one of the basic oxygen furnaces in a pumphouse and in a screening room. Some of this work involved the removal of hazardous asbestos insulation and replacing it with fibre glass insulation. At the General Motors' plant in St. Catharines, Lewis was engaged in repairing plates and replacing insulation during a shutdown in July and August.

17. Johns-Manville Canada Inc. ("Johns-Manville") was engaged in insulation work at Stelco's plant in Hamilton both before and after June 23, 1980. In fact, Johns-Manville has been engaged in an ongoing maintenance schedule at Stelco's plant in Hamilton since 1965. Apart from certain temporary work in order to protect personnel, all of the insulation was performed on existing systems. Shawn Tilson, Johns-Manville's national manager of contract business, testified that before June 23, 1980 he did not particularly make any distinction between maintenance and non-maintenance work. Certain evidence was produced before the Board with respect to Stelco's plant at Nanticoke. However, the work which was allegedly performed at Nanticoke by Johns-Manville was not part of the particulars of this complaint. Accordingly, the Board is not prepared to consider such evidence as part of this complaint.

18. Catalytic Enterprises Limited ("Catalytic") performed work which involved the application of insulation material for Sunoco Incorporated ("Sunoco") at Sarnia, for Shell Canada Limited ("Shell") at Corunna and at various other locations in Ontario both before and after June 23, 1980. Catalytic's work for Shell commenced in 1952 and its work for Sunoco commenced in 1953 or 1954. Catalytic's work for Shell and Sunoco involves the use of a crew of employees with a steady core of that crew who commenced work for Catalytic in 1952 or 1953. Catalytic's employees apply insulation work on pipes, pumps, compressors, tanks and vessels. At Shell's chemical plant and refinery Catalytic employs sixty per cent of the maintenance forces with Shell employing the balance of the maintenance forces. At Sunoco's refinery, Catalytic employs all of the maintenance forces. Shell and Sunoco operate their facilities on a twenty-four hours a day and three hundred and sixty-five days a year basis. Catalytic performs its maintenance services for Shell and Sunoco on a "cost plus" basis together with a fixed annual fee.

19. Consolidated Maintenance Services Limited ("Consolidated") performed work which involved the application of insulation work for the refinery of Gulf Oil Canada Limited at Clarkson and for the refinery of Texaco Canada Limited at Nanticoke. George Temple, Consolidated's Vice-President, described his company's work as basically similar to the work performed by Catalytic. Indeed, Catalytic and Consolidated are each other's principal competitor in the field of plant maintenance which involves the use of four or more trades.

20. EPI Incorporated ("EPI") is apparently a newcomer to multi-trade maintenance work on industrial facilities. EPI has performed work which involved the application of insulation material for Stelco at its Nanticoke plant both before and after June 23, 1980. Such work included removing and replacing insulation on a brine pump in a powerhouse. There were two brine pumps connected in parallel into a producing system and one pump was shut down while insulation was being replaced. Once the insulation was being replaced. Once the insulation was replaced both pumps were connected into a producing system.

21. The distinction between "maintenance" and "repair" in the construction industry is not one which is easily made. While section 1(1)(f) of the Act defines "construction industry" and refers to "repairing", the words "maintenance" and "maintaining" do not appear in the Act. Several of the witnesses who appeared before the Board used the words "maintenance" and "repair" interchangeably. Before June 23, 1980, Mr. Tilson, the national manager of contract business for Johns-Manville, did not particularly make any distinction between maintenance and repair. For some journeymen insulators the difference between maintenance work and construction work was the difference between working forty hours each week as

opposed to thirty-six hours per week in construction work. For Frank Burns, a steward for the respondent, the difference between maintenance and construction was one dollar and fifty-six cents an hour. Dewar performed work for Stelco in Hamilton, did not differentiate between maintenance and construction and always charged construction rates until this year because it had never signed a maintenance agreement.

22. However, the Board, since the introduction of the construction industry provisions into the Act in 1962 in *The Labour Relations Amendment Act, 1961-62*, S.O. 1961-62, c. 68, has regarded maintenance as not included in the definition of "construction industry" in section 1(1)(f). For example, in the *Tops Marina Motor Hotel* case, 64 CLLC ¶16,004, an application for certification was held to be properly made under the construction industry provisions of the Act. In that case the Board, in determining an appropriate bargaining unit of carpenters and carpenters' apprentices, stated that it was not its intention to include in that bargaining unit carpenters who might subsequently be employed to do ordinary maintenance work once the motor hotel was in operation. In the *Dravo of Canada Ltd.* case, [1967] OLRB Rep. June 261, the Board distinguished between an employer's maintenance operations and its construction operations and in *The Board of Governors of The University of Western Ontario* case, [1970] OLRB Rep Oct. 776, the Board determined that the employer was not operating a business in the construction industry because the employees who were the subject of an application for certification were engaged in maintenance rather than repair. In the *Overhead Door Co. of Toronto Ltd.* case, [1974] OLRB Rep. July 482, the Board examined the business of an employer who was engaged in the sale, distribution, installation, maintenance and warranty of various types of wood and metal doors and concluded that whether "maintenance" is to be considered as part of "construction industry" depends on the type of "maintenance" being performed and on the context of a given employer's operations.

23. The evidence before the Board established that insulators use the same tools, apply the same insulation and exercise the same skills whether the work is clearly new construction, which was agreed by all of the parties to be included within the definition of "construction industry" in section 1(1)(f) of the Act, or is described as either "maintenance" or "repair". Indeed, the line of demarcation between "maintenance" and "repair" is not a sharp one. On more than one occasion witnesses who were unable to define either "maintenance" or "construction" expressed confidence that they knew "maintenance" and "construction" (and, therefore, "repair") when they saw it.

24. Almost all of the work upon which this complaint is based involved applying insulation in order to maintain or sustain a system that was either producing or capable of producing a product according to its design. In some instances the system or portion of a system was actually functioning during the removal or application of insulation. In other instances a system or portion of a system was briefly closed down or advantage was taken of periodic or annual shutdowns in order to remove or apply insulation.

25. Reference was made to a decision of this Board and other labour relations boards where in accreditation proceedings "employers of employees employed in all phases of industrial plant maintenance and repair" were excluded from an appropriate unit of employers. See *The General Contractors' Section of The Toronto Construction Association* case, [1975] OLRB Rep. 134. Similarly, the Alberta Board of Industrial Relations in 1974 excluded maintenance work from a unit of employers in a proceeding analogous to accreditation. In Nova Scotia in 1975 in accreditation proceedings, the Labour Relations Board noted

the agreement of the parties that "Catalytic Enterprises Ltd., in its work for Canadian General Electric Ltd. at Port Hawkesbury, and employers similarly engaged in industrial plant maintenance under contract should be excluded from the unit [of employers]". In an accreditation proceeding in 1975, the Prince Edward Island Labour Relations Board decided that "maintenance and service work performed on completed installations" did not fall within the meaning of "construction industry". The definition of "construction industry in section 51(c) of the *Labour Act*, R.S.P.E.I., c. L.-1, is in all material respects the same as in section 1(1)(f) of Ontario's Labour Relations Act. In an accreditation proceeding in 1976 the Industrial Relations Board of New Brunswick excluded from a unit of employers "industrial plant maintenance work performed by employers such as Catalytic Enterprises Limited and other employers doing such work". None of the parties were able to refer to any cases in any jurisdiction where industrial plant maintenance had been regarded and treated as falling within the construction industry as defined either in section 1(1)(f) or in analogous definitions in any legislation. These decisions treat industrial plant maintenance as separate and apart from the construction. However, with the exception of the decision of the Prince Edward Island Labour Relations Board, none of these decisions has determined that industrial plant maintenance does not fall within the meaning of "construction industry". Therefore, the decisions referred to in this paragraph, other than the decision of the Prince Edward Island Labour Relations Board, are open to the interpretation that the exclusions of employers engaged in industrial plant maintenance from units of employers in accreditation proceedings are based upon a concept analogous to a lack of a community of interest when defining appropriate bargaining units.

26. Catalytic referred to its submissions before The Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry where it argued that the definition of construction contained in section 1(1)(f) of the Act is not sufficiently explicit to make it clear that industrial maintenance is not included in the definition of construction. Catalytic also referred to pages 60 and 61 of the Report of Mr. D. E. Franks in support of its argument that industrial plant maintenance ought not to be regarded as part of the construction industry. The portion of the Report states:

One further matter concerning the scope of these recommendations must also be dealt with. A number of the building trades have collective agreements which cover maintenance work. Under these collective agreements members of building trades unions work for employers engaged in general maintenance and repair work, usually on industrial sites. Such operations are really service operations rather than construction operations. As service operations they are outside the construction industry and thus outside of the recommendations made by this Commission. There is, however, a concern by those in the construction industry that construction work might be done under the guise of such a maintenance collective agreement. This is a valid concern, and where the work done under a maintenance agreement involves new construction or substantial reconstruction of premises, then that work is clearly within the construction industry and thus covered by the recommendations made in this report.

While the Board may look at the Report in order to see what was the mischief at which the amendment to *The Labour Relations Act* in 1977 with respect to province-wide bargaining was

aimed, it may not look at what the Report recommended. Lord Denning, M. R. expressed a cautious approach to the use of Reports in *Letang v. Cooper*, [1965] 1 Q.B. 232, when he stated at page 240:

It is legitimate to look at the report of such a committee [the Tucker Committee on the Limitations of Actions] so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief.

These remarks by Lord Denning are applicable to Catalytic's argument. This is particularly the case where in enacting *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31 (province-wide bargaining) the Legislature did not see fit to amend the definition of construction industry in section 1(1)(f). In fact, the definition of "construction industry" in the Act has remained unchanged since its introduction in 1962.

27. The complainant referred to numerous legal authorities in its argument and its word by word analysis of section 1(1)(f). These authorities were drawn from many jurisdictions and concerned the interpretation of "constructing", "altering", "repairing", "demolishing", and "revamping" in contracts and legislation in a wide variety of contexts. However, the Board found none of these authorities to be persuasive. The authorities cited before the Board under scored the necessity of considering the context in which a word is used in order to interpret its meaning.

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and it to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility. However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do,

perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair". In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

30. For reasons which are set forth in Board File No. 0875-80-M, *infra*, at page 1497 the Board finds that the document entitled "Maintenance Addendum as per Article #1.02 of Collective Agreement dated May 14, 1979" is a separate collective agreement covering maintenance as opposed to the provincial collective agreement which covers work which includes work in the industrial, commercial and institutional sector of the construction industry.

31. Article 1.02 of the provincial collective agreement refers to, among other terms, "repairing" and "maintenance". However, Article 1.02 also refers to "repairing" and "maintenance" performed "at the site of construction". With the exception of the new construction referred to in paragraph 28 the rest of the work referred to in that paragraph was not performed "at the site of construction". The rest of the work was performed on the premises of industrial clients. The Board finds that the provisions of Article 1 of the provincial collective agreement do not cover the rest of the work referred to in paragraph 28.

32. The separate maintenance collective agreement which was referred to in paragraph 30 purports to cover "repair" work in Article 2 thereof. To the extent that "repair" in this collective agreement purports to cover the repair work referred to in paragraph 29 and not as a synonym of "maintenance", such work is beyond the scope of the separate maintenance collective agreement. Such repair work is properly covered by the provincial collective agreement. The preceding remarks in this paragraph are also applicable to the inclusion of the word "repair" in independent collective agreements referred to in paragraph 11.

33. The General Presidents' agreements clearly address themselves to plant maintenance. In our view, where the word "repair" is used in Article 1.100, 3.000 and 4.000, it is also used as a synonym for "maintenance" and is not to be construed as "repair" as contemplated in section 1(1)(f) of the Act.

34. For the foregoing reasons the Board finds that the provincial collective agreement is the collective agreement contemplated by section 133(1) of the Act and that none of the other collective agreements referred to in this decision are null and void by virtue of the provisions of section 133(2).

35. Prior to the calling or authorizing of a strike by the employee bargaining agency on June 23, 1980, the respondent explained to its members that a strike was to be commenced with respect to employers which were covered by the provincial collective agreement. Thereafter, the respondent made every reasonable effort to ascertain the type of work which

such employers were performing. These efforts called for descriptions of the work to be performed, visits to the job sites by representatives of the respondent and reports by stewards and members. The respondent received requests for employees from many employers. Where the respondent was satisfied that the work to be performed was maintenance work and not covered by the provincial collective agreement it supplied its members to perform the work where an employer had signed a maintenance collective agreement. The complainant in making its allegations and in introducing evidence to establish violations of section 134a(1), relied upon work which had been performed by its members. In some cases the respondent supplied its members to perform work under the maintenance collective agreement only after a member of the complainant had either commenced a proceeding under section 123 of the Act or had threatened to commence a proceeding under section 123 of the Act if the respondent did not supply its members to perform work under the maintenance collective agreement. The performance of such work was then attacked by the complainant as contrary to the provisions of section 134a(1). Eight of the ten directors of the complainant either own or represent employers who performed work under the maintenance collective agreement after June 23, 1980. Twenty-one of the forty-four members of the complainant employed members of the respondent to perform work under the maintenance collective agreement after June 23, 1980, and other members of the complainant said they would do likewise if they could obtain the work. To say the least, the complainant, in fact, adopted one position while a majority of its members and directors behaved in an entirely opposite and inconsistent manner.

36. The new construction work referred to in paragraph 28 was performed after June 23, 1980, and the respondent has violated section 134a(1) of the Act. However, the violations of section 134a(1) were quantitatively small in terms of the totality of the evidence with respect to the work which was performed. Many of the issues raised in this complaint have not been previously considered by the Board and the respondent has made reasonable efforts not to violate section 134a(1). The respondent's business manager, Joseph Duffy, was prevented from visiting the premises of Fearman by security guards and was unable to inspect the work which was being performed. While not condoning the violations of section 134a(1), the totality of the evidence before the Board, the conduct of the membership of the complainant and the fact that the construction work has been completed do not warrant the exercise of the Board's discretion in issuing a cease and desist order pursuant to section 79 of the Act.

37. The complaint is dismissed.

0875-80-M The Master Insulators Association of Ontario, Inc. representing employers listed on schedule "A" attached hereto and employers listed on schedule "B" attached hereto, Employer, v. The International Association of Heat and Frost Insulators and Asbestos Workers Local 95, Trade Union.

Collective Agreement – Construction Industry – Reference – Whether maintenance addendum to provincial agreement constituting separate collective agreement

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and F. W. Murray.

APPEARANCES: *Robin B. Cumine, J. R. Blandford and Herb Near for the employer; S. B. D. Wahl and J. Duffy for the trade union.*

DECISION OF THE BOARD; October 23, 1980

1. The Minister of Labour has referred to the Board pursuant to section 96 of *The Labour Relations Act*, the question as to whether the Minister of Labour has authority under the Act to appoint a conciliation officer.

2. In a decision dated September 8, 1980, the Board advised the Minister of Labour that for reasons to be given in writing it was of the opinion that the Minister of Labour did have the authority to appoint a conciliation officer. The reasons for the decision of the Board are now set forth.

3. The Master Insulators' Association of Ontario (the "Association") is a designated employer bargaining agency pursuant to section 127 of the Act. The trade union and the International Association of Heat and Frost Insulators and Asbestos Workers (the "International") are a designated employee bargaining agency pursuant to section 127 of the Act. These designated bargaining agencies were parties to a provincial collective agreement which was effective from May 14, 1979, until April 30, 1980. A conciliation officer was appointed with respect to the provincial collective agreement and the trade union was in a position to engage in a lawful strike with respect to the provincial collective agreement on June 23, 1980.

4. The present request for the appointment of a conciliation officer was made by the trade union on July 7, 1980, and is based upon the position of the trade union that there exists a collective agreement with respect to maintenance work which is separate and apart from the provincial collective agreement referred to in paragraph three. The Association has taken the position that there is only one collective agreement and that the agreement with respect to maintenance work is merely an addendum to the provincial collective agreement. It follows from the position of the Association that, since a conciliation officer has already been appointed with respect to the provincial collective agreement, the trade union is not entitled to the appointment of a conciliation officer with respect to a so-called maintenance addendum which is not a collective agreement.

5. The provincial collective agreement was effective from May 14, 1979, until April 30, 1980. The so-called maintenance addendum was effective from May 14, 1979, until June 30, 1980. Collective agreement is defined in section 1(1) (e) which provides:

“collective agreement” means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members, of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees, and includes a provincial agreement;”

6. There is no doubt that the so-called maintenance addendum no less than the provincial agreement is capable of being interpreted as a collective agreement. In Article 1.01 of the so-called maintenance addendum, the Association “recognizes the trade union as the exclusive bargaining agent for all employees engaged in service, repair and renovation work within the Province of Ontario, as defined in Article 1.02 of the collective agreement [the provincial collective agreement] dated May 14, 1979”. The so-called maintenance addendum also provides in Article 2.01 that “the scope of this agreement shall cover all work of a service, repair, renovation and revamp nature, including shutdowns and turnarounds in an existing facility assigned by an owner-client to an employer covered by the terms of this agreement”. Article 2.02 in the so-called maintenance addendum provides that “the scope of this agreement shall not apply to work performed by the employer of a new construction nature which is work required to erect new facilities in which event the work shall be performed in accordance with the provisions of the collective agreement [the provincial collective agreement] dated May 14, 1979”. The so-called maintenance addendum and the provincial collective agreement are physically separate documents and in addition to containing separate recognition clauses, different hours of work, different fringe benefits and different scale of pay. The provincial collective agreement and the so-called maintenance addendum treat the following topics differently: overtime, meals, call-in-pay, foremen, statutory holidays and union dues. With respect to grievance and arbitration procedures, the provincial collective agreement contemplates the making of referrals under section 112a of the Act, while the so-called maintenance addendum bases its grievance and arbitration procedures on Section 37 of the Act.

7. One of the members of the Association has taken the position that the provincial collective agreement and the so-called maintenance addendum are separate collective agreement. Lewis Insulations Services Inc. (“Lewis”) commenced a complaint under section 123 of the Act in which it alleged that the trade union called or authorized an unlawful strike during the term of the so-called maintenance addendum. In addition, Lewis has also filed a grievance under the provisions of Article 13 of the so-called maintenance addendum in which Lewis has claimed damages for losses suffered by it as a result of an unlawful strike. In addition, Dewar Insulations Inc. (“Dewar”) another member of the Association, threatened to file a complaint under section 123 of the Act if the trade union did not agree to provide Dewar with members to perform work under the so-called maintenance addendum at a time when the trade union was in a position to call or authorize a lawful strike with respect to the provincial collective agreement. Stan Keery, a vice-president of Dewar, conceded that Dewar and the Association were taking inconsistent positions with respect to the existence of one or two collective agreements. Mr. Keery explained that the Association wanted a maintenance agreement in 1979, which it did not have previously, and wanted this agreement to be separate the apart from the construction agreement. Mr. Keery explained that in order to compete with a client’s own in-plant force, it was necessary for the Association to conclude a separate maintenance agreement from the construction agreement which would contain lower rates of

pay and more competitive terms. The Board finds that in fact the parties executed two separate collective agreements.

8. The Association and the trade union signed a memorandum of settlement dated May 7, 1979. However, this memorandum of settlement contemplates that the new collective agreement would expire on April 30, 1980. No other date of expiry is referred to in the memorandum of settlement and, indeed, there was no evidence before the Board concerning why the so-called maintenance addendum should be in effect until June 30, 1980, if it is part of the provincial collective agreement. While Article 1.02(a) and 1.03(c) of the provincial collective agreement appear to contemplate the existence of a collective agreement and a so-called maintenance addendum rather than two separate collective agreements, the language of both documents and Article 1.02(a) establishes that the so-called maintenance addendum has not been incorporated by reference into the provincial collective agreement and that the so-called maintenance addendum is in itself a complete collective agreement.

9. In Board File No. 0868-80-U, *supra*, at page 1477 the Board, in a proceeding between the employer, the trade union and other parties, examined the difference between "repair" and "construction industry" which are defined in section 1(1) (f) of the Act. In that decision the Board concluded that "maintenance" is not part of the construction industry and stated in paragraphs 29, 30 and 31 of that decision as follows:

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair". In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

30. For reasons which are set forth in Board File No. 0875-80-M, *infra*, at page 1497 the Board finds that the document entitled "Maintenance Addendum as per Article #1.02 of Collective Agreement dated May 14, 1979" is a separate collective agreement which covers work which includes work in the industrial, commercial and institutional sector of the construction industry.

31. Article 1.02 of the provincial collective agreement refers to, among other terms, "repairing" and "maintenance". However, Article 1.02 also refers to "repairing" and "maintenance" performed "at the site of construction". With the exception of the new construction referred to in

paragraph 28 the rest of the work referred to in that paragraph was not performed "at the site of construction". The rest of the work was performed on the premises of industrial clients. The Board finds that the provisions of Article 1 of the provincial collective agreement do not cover the rest of the work referred to in paragraph 28.

10. "Maintenance" is not a part of the construction industry and therefore a provincial agreement as defined in section 125(1) (e) and as contemplated by section 133 may exist separate and apart from a collective agreement between the same parties with respect to "maintenance".

11. It was for the foregoing reasons that the Board advised the Minister of Labour that he had the authority under the Act to appoint a conciliation officer with respect to the collective agreement between the employer and the trade union which remained in effect from May 14, 1979, until June 30, 1980.

1047-80-M Local 494 United Cement Lime & Gypsum Workers International Union, Applicant, v. Nelson Crushed Stone Division of Flintkote Canada Ltd., Respondent.

Employee – Application under section 95(2) – Board only deciding whether person in dispute is "employee" under act – Scope of collective agreement matter for arbitration

BEFORE; M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

DECISION OF THE BOARD; October 6, 1980

1. This is an application filed under section 95(2) of *The Labour Relations Act* in which the Board is requested "to appoint an Officer to investigate the following names as to whether these people should be members of the bargaining unit or not according to our Collective Agreement." [Names omitted]

2. Once a collective agreement has been entered into, a subsequent dispute as to whether or not a particular person is a member of the bargaining unit often involves *two* questions. The first question is whether the person is an "employee" within the meaning of *The Labour Relations Act*. That is the only question to which the Board addresses itself under section 95(2), and usually involves an assessment of whether the person "exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations", within the meaning of section 1(3) (b) of the Act. It is, unfortunately, not as clear as it might be whether this is a question which, in the context of a collective agreement, can only be brought before the Ontario Labour Relations Board for determination. See *Canadian Industries Ltd.*, [1972] 3 O.R. 63; *Re Miller et al and Algoma Steelworkers Credit Union*, 75 CLLC ¶14,289; *Re General Concrete*, (1978), 22 O.R. (2d) 65. In any event, if it is determined that the person is an "employee" within the meaning of *The Labour Relations Act*, the second (and ultimate) question is whether the person is covered by the collective agreement itself, having regard to

the language of the “Scope” clause and any factors relevant to its interpretation. That question may be determined by the parties pursuant to the grievance and arbitration provisions of the collective agreement. It might be further noted, as an incidental matter, that once a collective agreement is entered into, the Board itself (in normal circumstances) considers the effect of its own certificate to have been “spent”, in the sense that it is the language of the collective agreement negotiated by the parties which then governs as to the extent of the bargaining unit currently represented by the trade union. See *Gilbarco Canada Ltd.*, [1971] OLRB Rep. March 155.

3. In the present case, as can be seen, the question put to the Board is whether the named persons are members of the bargaining unit or not “according to our Collective Agreement”. This raises a suspicion that the issue between the parties is not the one which the Board considers under section 95(2). The Board has now received written confirmation from the respondent that it does not dispute that the contested persons are employees for the purposes of *The Labour Relations Act*. Accordingly, no purpose would be served by an inquiry by the Board into the question. The only issue that exists between the parties is whether the contested persons are covered by the terms of the collective agreement and that, as noted, is properly a matter for private arbitration.

4. The application before the Board will therefore not be proceeded with and is hereby dismissed.

0557-80-R Ontario Nurses’ Association, Applicant, v. Oakwood Park Lodge, Respondent.

Certification – Employee – Board previously finding managerial status – Different union party to earlier decision – Whether Board applying *res judicata* – Whether finding of employee status *in rem* determination

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. K. Lee and F. W. Murray.

APPEARANCES: *D. Anderson and N. Boyd for the applicant; and L. Bertuzzi, R. Stevenson and M. Cox for the respondent.*

DECISION OF THE BOARD; October 29, 1980.

I

1. This is an application for certification filed on June 10, 1980. The applicant trade union seeks to be certified as the bargaining agent for some 11 registered nurses employed by the respondent at its nursing home in Niagara Falls, Ontario. The respondent contends that none of these registered nurses are “employees” within the meaning of *The Labour Relations Act*, because all of them exercise managerial functions. The respondent further contends that the present applicant is not entitled to lead any evidence or make argument with respect to the

employee status of these registered nurses, because this matter has already been conclusively determined against it by a decision of the Board (differently constituted) issued in December 1977.

2. On July 15, 1977, the Service Employees International Union (with which the present applicant has no connection) applied for certification as the bargaining agent for the registered, graduate, and undergraduate nurses then employed by the respondent at its Niagara Falls location. As in the present case, the respondent took the position that none of these registered nurses were "employees" within the meaning of the Act. In view of this dispute concerning the status of the individuals affected by the application, the Board appointed a labour relations officer to enquire into their duties and responsibilities, and report back to the Board. Subsequently, the S.E.I.U. and the respondent agreed that the evidence of one nurse, Margaret Ballam, (who is still employed by the respondent), would be representative of all of the registered nurses. Having regard to the agreement of the parties and on the basis of Ms. Ballam's evidence, the Board concluded that all of the registered nurses exercised managerial functions and, accordingly, none of them were employees within the meaning of the Act. For this reason, the application brought by the S.E.I.U. was dismissed.

3. The Ontario Nurses Association was not a party to this earlier application or to the agreement to limit the evidence; nor would it then have had the status to intervene had it wished to do so. There is no appeal from the Board decision, and even an immediate party has only a limited right to reconsideration or judicial review. It is doubtful whether either option would be open to a non party, whom the respondent now contends, must nevertheless be bound by the earlier result.

4. At the time of the Board's earlier decision, the respondent employed 7 registered nurses. Now, there are 11. Four of the present complement of registered nurses were employed at the time of the original decision. Seven were hired subsequently. In 1977, the total employee complement was 57. It is now 116. It is evident therefore, that there has been a substantial expansion in the scope of the employer's operation, and a significant change in the composition of its nursing complement.

5. The applicant concedes that since 1977, there has been no material change in Ms. Ballam's duties and responsibilities, nor are the duties of the other nurses significantly different from what they were before. The applicant argues however, that the earlier Board decision was "wrong" - in part, at least, because the Board did not have sufficient evidence before it to properly assess the business context, or the role played by registered nurses in establishments such as that run by the respondent. The applicant is the principal trade union representing nurses in Ontario, and advises the Board that it currently represents nurses at 56 nursing homes who perform essentially the same duties as the nurses employed by the respondent. The applicant contends that since neither it, nor the majority of the respondent's nurses were, or could have been, participants in the earlier proceedings, it should not now be bound either by the decision of the Board, or the agreement on the "representativeness" of Ms. Ballam on which it was based. Since the parties are different, the applicant submits that *res judicata* has no application; moreover, since important statutory rights are involved it is argued that it would be inconsistent with the very purpose of the Act (to further collective bargaining) if the Board denied the applicant the opportunity to lead evidence and make its submissions concerning the status of the subject employees.

6. The respondent argues that in the absence of a material change in the nurses' duties and responsibilities, their employee status has been conclusively determined by the earlier decision. The 1977 decision is a decision "*in rem*" which binds the applicant even though it was not a party in the earlier proceedings. By statute, the 1977 decision is made "final and conclusive for all purposes". In the respondent's submission, it would make nonsense of that statutory provision if the status issue could now be relitigated. It was reasonable for the company to rely on the Board decision as final, and the Company did in fact rely on it in developing its managerial structure. In the circumstances, the respondent contends that it would be inequitable and vexatious to reopen the status issue now.

II

7. The Board has the exclusive jurisdiction to determine all matters of fact *and law* in any proceeding before it; but there are no statutory provisions respecting the applicability of particular legal doctrines such as *res judicata*. Sections 95 and 97, making the Board's decisions final and conclusive, provide some support for the respondent's position; although it should also be noted that section 95 also gives the Board the authority to reconsider any decision at any time if it considers it advisable to do so. Section 91(12), on the other hand, and the principles of natural justice, support the applicant's contention that, as a matter of law, it is entitled to a "full opportunity" to present its evidence and make its submissions.

8. Sections 94 of the Act is the only provision which speaks directly to the use which the Board may make of a previous determination. Section 94 makes a finding of trade union status *prima facie* evidence of status in any subsequent proceeding. This is a clear legislative expression with respect to the Board's use of a determination which, on the respondent's analysis, would be a finding *in rem*, but its purpose is susceptible to various interpretations. It could be argued that section 94 was intended to modify the *in rem* effect of a union status determination because it was considered undesirable to bind parties or strangers to this extent (thereby raising the subsidiary question of why this status issue should be treated differently from others). Alternatively, it could be argued that section 94 was necessary because a status finding is not *in rem* and accordingly would have to be relitigated in virtually every proceeding in which a union was involved. Finally, it could be argued that section 94 merely indicates that the Legislature directed its mind to this status issue which was likely to arise frequently and there was no intention to address the more general question of *res judicata*. (On balance, we consider the latter explanation to be the better one.) It should also be noted that in at least one instance, the Legislature has expressly empowered the Board to bar strangers who may have taken no part in an earlier proceeding. Section 92(2)(i) permits the Board, following an unsuccessful certification application by one party, to refuse to entertain *any* new application by the unsuccessful applicant or by *any other trade* union purporting to represent the employees involved in the original proceeding.

9. Although the Act does not expressly authorize the application of the doctrine of *res judicata*, there are strong practical and policy grounds for doing so. Rights and duties have meaning only if they are certain and relatively stable. Parties expect that a decision of the Board will clarify their legal relationship and put an end to the controversy between them. Board decisions would lose much of their value if they did not provide a reliable guide for the conduct or planning of the parties' affairs. Continuous litigation would undermine the harmonious relationship between the parties which the Act is designed to foster, and could give rise to abuse and harassment of a weaker party. It could also give rise to costly duplica-

tion, inefficient utilization of the Board's scarce resources, and a serious impediment to the effective administration of the Act. This potential consequence is especially serious in labour relations matters where "time is the essence" and finality is an important statutory objective. Moreover, from an institutional point of view, the prospect of relitigation greatly increases the possibility of inconsistent decisions which can only undermine the credibility of the adjudication system and the adjudicators. The doctrine of *res judicata* serves to minimize these possibilities, and is based upon the entirely reasonable expectation that if a judgment is rendered in an earlier case which is related logically to a subsequent proceeding, the former will be taken into account in resolving the latter. Indeed, this is the theory which underpins the development of the common law and the principle of *stare decisis*. Cases involving similar factual and legal questions should be decided in the same way, and if there is a close relationship in terms of the parties and issues involved, the interrelationship of the two proceedings may legitimately preclude the relitigation of those issues already settled. The utility of such doctrine is "obvious" as the Board noted in *Arnold's Markets*, 62 CLLC ¶ 16,221 at page 992:

"It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in a proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision."

10. The Board has applied a doctrine akin to *res judicata* in variety of circumstances. In *Arnold's Markets*, *supra* the Board held that a previous finding between the parties that an employee had been unlawfully discharged, was binding in a subsequent proceeding *between the same parties* in which the trade union challenged the validity of a representation vote. In *Holland River Gardens Company*, 64 CLLC ¶ 16,304, the Board refused to allow a respondent to relitigate the "agricultural employee" status of certain individuals, because that issue had been conclusively determined in an earlier application between the same parties. In *Becker Milk Company Limited*, [1974] OLRB Rep. Sept. 621, the Board affirmed the availability of the doctrine of *res judicata* even though it doubted its strict application to a tribunal with broad powers of reconsideration, and declined to apply it in the circumstances of that case because there had been no adjudication on the merits. (With respect to the breadth of the power of reconsideration see: *British Columbia Labour Relations Board et al. v. Oliver Cooperative Growers Exchange*, [1963] S.C.R. 7). In *Concrete Construction Supplies*, [1979] OLRB Rep. Dec. 1152, a complainant was barred from relitigating a complaint under section 60 which had already been considered and dismissed in an earlier proceeding. In *Napev Construction Ltd.*, [1980] OLRB Rep. June 872, the parties were precluded from relitigating the issue of the existence of a binding collective agreement. In *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Sept. 722, and *Arthur G. McKee and Company Canada Limited*, [1976] OLRB Rep. Oct. 637, the Board held that the respondents were estopped from contesting the fact of their participation in an unlawful strike, in a subsequent proceeding between the same parties in which their employer sought consent to prosecute them for their misconduct. (This decision may be contrasted with that of the Board in *Wright Assemblies*

Limited, 61 CLLC ¶16,215, where it was held that the Board's earlier decision in a consent to prosecute application brought by a trade union did not preclude it from filing a subsequent unfair labour practice complaint. The Board ruled that in the earlier case, the trade union had been seeking relief on its own behalf, while in the later one, it was acting as agent for the aggrieved employees. Because the union was acting in two different capacities, the Board, after reviewing the common law decisions on point, decided that in substance, the parties in the two proceedings were different.)

11. The recent examples of the application of the doctrine of *res judicata* arose in the series of cases between the United Steel Workers of America and Tandy Electronics Limited (carrying on business as "Radio Shack"). In *Radio Shack*, [1979] OLRB Rep. March 248, the Board ruled that the findings of fact and law conclusively determined the fact and character of the employer's contravention of the Act and could be relied upon to establish such contravention in a later proceeding under section 7a of the Act. The Board declined to allow the company to relitigate those issues. When this decision was challenged on judicial review, (see: *Tandy Electronics Ltd.* 79 CLLC ¶14,216), Cory J., for a unanimous Divisional Court remarked (at p. 15,292):

"The Act is a code designed to resolve volatile labour disputes quickly and relatively inexpensively. To apply, as the Board did here, the doctrine of *res judicata* in a limited way, appears to be proper and commendable. To give effect to the applicant's contention [that the question of a contravention of the Act had to be relitigated] would fly in the face of the intent of the legislation."

12. Subsequently, the Board had occasion to consider a further proceeding between the same parties in which the trade union alleged a further series of unfair labour practices, including a failure on the part of the employer to bargain in good faith. In reaching its conclusion that there had been further breaches of the Act, the Board considered and relied, in part, upon the findings of fact and law made in the earlier proceedings. This too became the subject of a challenge in the Divisional Court (see: *Tandy Electronics* #2, 80 CLLC ¶14,017). The respondent claimed that reliance on these earlier decisions involved a denial of natural justice and the consideration of extraneous matters. In the respondent's submission, the earlier decisions were "mere pieces of paper" and should not have been considered at all. After noting that these earlier findings were relevant to the issues subsequently before the Board, the Court went on to say:

"Apart from their relevance, should the prior decisions be admitted? What are these "pieces of paper"? They represent the decision of the Board made after a hearing involving the same union and the same company, that the company had committed a breach of *The Labour Relations Act*. Each of the decisions was made concerning matters wherein exclusive jurisdiction had been conferred upon the Board. The company, after due notice of the hearing, with full opportunity to cross-examine witnesses called on behalf of the union, to call its own witnesses, and to submit argument, had been found in breach of a provision of the Act. Under the circumstances of this case, the referral to the earlier decisions should not be considered either a denial of natural justice or a consideration of extraneous matters.

Their consideration by the Board was proper and appropriate. The Board's position on this issue does not constitute an interpretation of its statute that is so patently unreasonable that its construction cannot be rationally supported. In addition, its decision on this point would seem to fall within the jurisdiction conferred upon it by s. 92(2)(c) of the Act.

In general terms, the continuing responsibility of the Board to monitor the relationships between companies, unions and employees may often render it necessary and essential for the Board to consider prior decisions made by other panels. *So long as those prior decisions involve the same union and the same company, are relevant to the issue under consideration, are timely to the issues under consideration, then it would seem to be appropriate for the Board to refer to those decisions.* The extent to which they can be utilized must be restricted to the actual decision of the Board together with those findings of fact made by the Board that were essential to its decision. No other findings of fact or evidence that may be contained in the decisions should be considered.

In certain situations, the consideration of a prior finding by a different panel of the Board may be an essential requisite or condition precedent to a subsequent determination of the Board. See *Tandy Electronics Limited v. United Steelworkers and Ontario Labour Relations Board*, 79 CLLC ¶ 14,216.

It should be observed that to hold otherwise would impose practical problems of a well nigh insurmountable nature. For example, in this case it might well be difficult if not impossible for a union to locate former employees who had been wrongfully dismissed as a result of their union activity. To give force to the argument submitted on behalf of Radio Shack would appear to confer benefits on that party which could litigate most often, a result contrary to the general intent of *The Labour Relations Act*.

In summary, upon a consideration of the Act, as a whole, as well as certain specific provisions, upon a review of the Boards reasons, and applying the test suggested by *Canadian Union of Public Employees v. New Brunswick Liquor Board*, *supra*, it cannot be said that the Board exceeded its jurisdiction." [emphasis added]

13. It is clear from the two *Radio Shack* decisions that the Court has sanctioned the use of a doctrine analogous to *res judicata* – at least as between the same parties. It is also evident that in approving that use, the Court sought to accommodate both the rights of a party to a fair hearing, and the practical or administrative problems which might arise if issues previously resolved between the parties had to be relitigated. The Court was careful to point out however, that the requirements of natural justice had been satisfied because the findings subsequently relied on by the Board had been established in an earlier proceeding between the same parties in which both had had a full opportunity to present their evidence and make their submissions. Such is not the case in the matter presently before us. In the present case, the applicant trade union had had no opportunity to address the issue which the respondent contends has already been conclusively determined against it.

14. The Board has recently had occasion to comment on the application of the doctrine of *res judicata* in two cases which involved a previous determination of employee status. In *Central Park Lodges of Canada*, Board File No. 2049-79-M, released March 12, 1980 the Board had before it an application under section 95(2) of *The Labour Relations Act* in which the employer argued that a “question” had arisen between the parties concerning the status of its registered nursing assistants. In a previous unfair labour practice proceeding however, the employer had asserted that these individuals were “employees”, and the Board had relied upon that submission in dismissing the union’s complaint. In holding that the employer could not abandon its former position and have the matter relitigated, the Board remarked:

“The respondent trade union objects to this application on the ground, primarily, that this very issue was disposed of by the Board in prior proceedings between the parties, being Board Files No. 0856-79-U and 1009-79-U.

It appears to the Board that the position taken by the respondent is correct. The subject matter of the prior proceedings was different from that contained in the present application. One was a section 79 complaint alleging that the registered nursing assistants as a result of the union activities of the former group. The second was a section 79 complaint alleging that the registered nurses were laid off and replaced by the registered nursing assistants as a result of the union activities of the former group. The second was a section 79 complaint alleging a failure on the part of the employer to bargain in good faith. In those proceedings, however, the employer apparently took the position that its registered nursing assistants were “employees” within the meaning of *The Labour Relations Act*, and indeed covered by a subsisting collective agreement with the now respondent trade union. There were two collective agreements in operation at the employer’s premises. One covered registered nurses, and the other as explicit as it might be, the *agreed* statement of facts placed before the Board in the prior proceedings indicates that such registered nursing assistants as were utilized by the employer at that time were covered by the “service” collective agreement with the trade union. The Board appears to have relied upon that representation in coming to the conclusion that it did, i.e., that the actions of the employer were not motivated by any anti-union animus. . . . While this finding with respect to the employment status of the registered nursing assistants was not “necessary” to the Board’s determination of the issue before it, it is clear, on the other hand, that it did form an integral part of the Board’s reasoning, and can in no way be regarded as *obiter dicta*. At the very least, the employer must be said to have had the “benefit” of having its representation accepted by the Board. There is nothing which would suggest that it is based on the duties expected of the registered nursing assistants having changed materially since the time of the earlier proceedings. Accordingly, whether one applies the doctrine of estoppel, or a principle analogous to that of *res judicata*, the employer is precluded from applying as it has to have the Board re-determine the employment status of its registered nursing assistants.”

In *Westmount Hospital*, *infra*, page 1572, the Board had before it an application under section 95(2) in which an employer sought a determination of the status of the "head nurses" in its employ. The respondent union (The Ontario Nurses Association) claimed that the issue had been conclusively settled between the parties by a decision of the Board in February 1976; and further that there had been a series of collective agreements since that time which had included the category of "head nurses". The board dismissed the union's preliminary objection in the following terms:

"The Board does apply a doctrine analogous to *res judicata* to situations of this kind. See *Central Park Lodges*, Board File No. 2049-79-M, released March 12, 1980. That doctrine does not, however, preclude a fresh application where the duties and responsibilities have changed in a material way from those before the Board in its prior determination. That is precisely what is alleged by the applicant in the present case. The Board would, therefore, normally appoint a labour relations officer limited to inquiring into the changes in duties and responsibilities since the date of the prior application.

The parties, however, are currently bound by a collective agreement entered into on May 12, 1980. Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party, having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a "question" exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not, however, permit an application (other than one relating to changes in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan 18). Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board officer to inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that

the appointment should not be limited to “changes”, it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment.”

15. Each of these cases (and, indeed, all of the cases to which we have referred *supra*) involved an attempt to relitigate an issue which had already been decided in a previous proceeding between the same parties. There are two cases in which the Board indicated a willingness “to take a second look” even between the same parties. In *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. Apr. 261, the Board did not consider itself precluded from reexamining the managerial status of certain individuals because of a decision, apparently based on the agreement of the parties made some twenty-six years before. In *Globe & Mail Limited*, [1976] OLRB Rep. Nov. 662, the Board was dealing with a certification application in respect of a group of individuals who, thirteen years before, had been held to be managerial. The union claimed that both the law, and the employee’s duties had changed – and in this sense, the case is distinguishable from the one presently before us. The Board held that the existence of an earlier decision between the parties cast an onus on the union to demonstrate that the earlier decision should not be followed. At page 666, the Board commented:

“The Board, in resolving this issue, notes that ultimate outcome of this case hinges upon the soundness of the applicant’s assertion of “a change” in duties and responsibilities since 1963. We do not view the instant application as a fresh situation where the presumption of employee status ought to prevail. The Board’s past decisions represent “weighty” authority with respect to the DSR’s employment status that we agree ought not to be undermined in a superficial fashion. In this context, the Board adopts the respondent’s concerns that we should not undermine the wisdom of the past without sufficient cause. (See, for example, the recent decision of the *Chrysler Canada Limited* case, [1976] OLRB Rep. Aug. 396, where “foremen” were determined to exercise managerial functions notwithstanding the suggestion of a change in duties and responsibilities in the context of the Board’s prevailing perceptions of a managerial function.) In short, through the years we can perceive that a usage had developed within the particular framework of the organizational structure of the respondent’s circulation department that ought not to be tampered with unless the evidence clearly justifies it. (See: Reed, G.W., *White Collar Bargaining Units Under the Ontario Labour Relations Act* (1969) Queen’s University Printer at p. 135.) In this context, the Board is conscious that several collective agreements have been negotiated since 1963 on behalf of employees engaged in the respondent’s circulation department where the exclusion of the DSR from the agreement’s scope has not been questioned. As a result, we are of the opinion that the applicant ought to be put to the test of showing cause as to why we ought to depart from our past findings of treating the DSR as a managerial person. In doing so, we note that notwithstanding counsel’s submissions with respect to the presumption of employee status, he nonetheless in the presentation of the applicant’s case adduced evidence and made argument in such a way that clearly reflected, from a practical perspective, that the onus indeed was upon the applicant to establish the non-managerial nature of the DSR’s duties and responsibilities.

Before leaving this phase of the case, the Board is indeed quite concerned that we ought to preserve the stability of the collective bargaining relationship established by the parties through the years as a result of a Board certificate. Nonetheless, it does not follow that any Board decision made in the past is "carved in stone" and is thereby rendered immune from review. Should the merits of this case with respect to issues raised herein fall in favour of the applicant trade union, the respondent employer may simply be required (subject to its rights of review) to make whatever adjustments are necessary to accommodate our pronouncements. In other words, the decisions of this Board as they are amended or varied from time to time must take precedence over the parochial concerns of a constituent party notwithstanding the inconvenience that may result."

16. Before turning to the two Board decisions which bear directly on the issue now before us, it may be appropriate to note that the Labour Relations Board is not the only tribunal in the industrial relations field which applies a doctrine analogous to *res judicata*. Statutory Boards of Arbitration have also done so (although in the context of an established collective bargaining relationship the matter almost always arises between the same parties so it is unnecessary to consider whether a finding is "*in rem*"). There is a general consensus on the requisite elements necessary to establish the plea, but there is considerable variance in opinion as to the extent to which an earlier decision actually precludes a reconsideration of the issues in dispute. As might be expected, *ad hoc* tribunals are less inclined to consider the decisions of their predecessors absolutely binding – even though the existence of an established contractual relationship creates a real need for uniform administration of the agreement, and the reliance interests of parties at arbitration are just as great as those of parties appearing before the Labour Relations Board. Some arbitrators consider the decisions of previous Boards to be absolutely binding. Others do not accept that the "first look at a problem is necessarily the correct look" or that "it is a desirable policy that it is better that a matter be settled than that it be settled right" (See *Re C.G.E.* (1959), 9 LAC 342). Perhaps, the most prominent among this school was Professor Laskin who commented in *Re Brewers Warehousing Limited* (1954), 5 LAC 1797 at p. 1798:

"It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same agreement where the dispute involves the interpretation of the agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable."

Similar views were expressed by Professor Arthurs in *Wicket and Craig Limited* (1963), 13 LAC 363 where he distinguished between the *persuasive* and the *preclusive* (or binding) effect of a previous decision. In Professor Arthurs' view, a tribunal was not legally bound to follow an earlier decision, however:

"in considering the effect to be accorded an earlier award between the same parties. . . a second arbitrator considers both its reasoning and its expected precedential role, and may be so overwhelmed by the combined weight of both factors that he is persuaded to defer to it even though he would not have done so where he too consider its reasoning alone."

A previous decision may not be legally binding, but if it is between the same parties, involves the same issues and was relied upon by the parties in structuring their relationship, there are strong practical reasons why the earlier decision should not be disturbed unless there are compelling reasons for doing so.

17. We were able to find only two previous Board cases in which the Board suggested that a finding might constitute a decision “*in rem*” which would be binding on strangers to the proceedings in which it was made, and would preclude them from relitigating an issue. It is evident however that there are numerous issues which might, (arguably), be considered “status questions”, and if so considered could be characterized as determinations *in rem* – for example: whether an employer is a successor employer, whether an employee is employed in agriculture, whether an entity is a federal work or undertaking, whether an employer is engaged in interprovincial transportation, whether a trade union is the bargaining agent for a group of employees, whether a project is in the I.C.I. sector of the construction industry, whether an individual is an employee, whether a document is a collective agreement and so on. The acceptance of an “*in rem*” doctrine could have important ramifications for the Board’s jurisprudence.

18. The question of whether a determination of employee status could be a finding “*in rem*” foreclosing anyone from relitigating that issue was considered in *Canadian General Electric*, [1978] OLRB Rep. Apr. 384. At paragraph 19, the Board stated:

“The Canadian Encyclopedic Digest, 10 CED (Ont. 3d) p. 151 defines an *in rem* decision as follows:

‘A judgment *in rem* is universally binding. It is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it concludes [sic] all persons from stating that the status of the thing adjudicated upon was not that declared by the adjudication. Judgments *in rem* are conclusive against all the world, not only as to the res itself but also as to the grounds on which the tribunal professes to decide, or may be presumed to have decided.’

The Board’s 1954 decision dealt with the status of the persons in question as employees under the Act. It was, therefore, a decision of general application or analogous to an *in rem* decision. This decision was binding upon all persons and not just between the parties to that proceeding. It follows, therefore, that the respondent in this case need not prove that the parties to that decision were the same as the parties to these proceedings.

No previous judicial or Board authority was cited in support of this conclusion; moreover, since the Board subsequently found that there had been change in the statute, and therefore “the law” since the 1954 decision, its observations were *obiter* and not strictly necessary to its final decision. However, even the *C.G.E.* decision itself contains the following *caveat* (at paragraph 26):

“Finally, we turn to the applicant’s contention that even if the Board finds that there has been an insufficient change in law or fact to displace the pleas of issue estoppel, the Board has the discretion to decline to apply the plea and should exercise that discretion in this case. As an administrative tribunal charged with the administration of *The Labour Relations Act*, the Board is mindful that there may be situations where a strict application of the doctrine of *res judicata* must be tempered by industrial relations realities. At this stage of the proceedings, however, it is premature for the Board to consider whether in this case it should exercise its discretion in the manner requested.”

19. The other decision of interest is *Municipality of Metropolitan Toronto*, [1968] OLRB Rep. February 1096, (although unlike *C.G.E.*, *supra* there was no mention of *res judicata*, *estoppel*, a finding “*in rem*”, or even *stare decisis*). In *Municipality of Metropolitan Toronto*, the Board had before it an application for certification in respect of a group of individuals who six years earlier had been found to be “managerial” in a certification application by *another trade union*. When the later application came on for a hearing, the Board advised the parties that “it had no appellate jurisdiction” over another division of the Board, and that consequently the applicant must establish a substantial change in the duties and responsibilities of the subject individuals or the Board would not disturb the earlier decision. Of course, the new application was not an appeal and, even apart from section 95, the Board (being a tribunal of co-ordinate jurisdiction) had the same independent decisionmaking authority as did the earlier panel – subject only to argument based on reason, and the citation of authorities which would now include a decision on the very point in question involving one of the parties and, in all likelihood, at least some of the same employees. In the result, the applicant was unable to demonstrate a significant change in the employees’ duties and responsibilities and the Board therefore dismissed its application. A careful reading of the Board’s reasons however, does not reveal whether the Board considered itself *precluded as a matter of law* from reaching a different result, or whether it was simply not persuaded that in the circumstances it should do so. The absence of any discussion of *res judicata* suggests the latter interpretation.

20. We have canvassed a number of common law authorities and texts (and, in particular, G.S. Bower and H. Turner, *The Doctrine of Res Judicata*, 2d edition, (1969) Butterworths, London), but have not found them very helpful in resolving the issue now before us. The elements necessary to establish the plea are fairly well accepted, as are the public policy reasons supporting its application. Both of these have been succinctly summarized by the Board in *C.G.E.*, *supra*. There is no doubt, moreover, that the definition of an *in rem* determination adopted by the Board in that case is the generally accepted one, and, could be said to apply to a finding that a person is an employee under *The Labour Relations Act*. The difficulty is that there are other general statements suggesting a contrary conclusion. *Phipson on Evidence* (12th edition, 1969) Sweet and Maxwell, London for example, contains the following proposition at p. 1384:

“Judgments and verdicts upon public or general rights are not only conclusive between parties and privies but *prima facie* evidence of the matter decided between strangers or a party and a stranger. They are not, however, conclusive in the latter cases...”

Both the statements adopted by the Board and that in *Phipson* have judicial support, but as is the case with many of the decisions involving *res judicata* (and especially those dealing with determinations “*in rem*”) these cases arise in a legal context entirely foreign to that which concerns the Board. We do not think that 19th century cases concerning, in many instances, the resolution of property disputes or the devolution of estates, provide a very reliable source for the interpretation of *The Labour Relations Act*. Even the matrimonial cases do not provide an exact analogy; and it is interesting to note that the notion of an *in rem* determination has been described by the Supreme Court of Canada in *Sleeth v. Hurlbert* (1896), 25 S.C.R. 620 as “a harsh doctrine—a doctrine that may be used to the unjust destruction of individual rights and interests”. We were unable to find any case in which the Courts faced a situation identical to that now before us, but even if we had, it must be recognized that as a statutory tribunal with a mandate to administer a statute, monitor relations between employers and employees, and promote orderly collective bargaining, the Board might well have to approach the problem in a way that is different from that of the Courts. Moreover, at common law, it is clear that the Courts have been unwilling to extend the doctrine of *res judicata* even where the rationale underpinning the doctrine would appear to be applicable. In *Hollington v. Hewthorne*, [1943] K.B. 587, for example, the English Court of Appeal held that a criminal conviction (establishing the guilt of the accused beyond a reasonable doubt) was not even *prima facie* evidence in a subsequent civil proceeding that the individual had committed the act for which he was convicted. In *Society of Medical Officers of Health v. Hope*, [1960] A.C. 551, the English Court of Appeal held that a taxpayer could relitigate the applicability of a statutory exemption even though there had been no material change in circumstances in the five years since the issue had been first decided. The Court apparently regarded the new valuation (based on the same statutory exemption) to be a “new question” between the taxpayer and the taxing authorities. The need for finality, the duplication of proceedings, and the possibility of inconsistent judgments were not considered overriding concerns in these cases. In our view, despite the undoubted utility of the doctrine from an administrative point of view, its complexity and the need to harmonize its principles with the purposes embodied in *The Labour Relations Act*, fully justify a cautious approach in its application.

21. We do not think that we are compelled as a matter of law to bar the applicant from relitigating the status of the respondent’s employees; nor having considered the decided cases and the countervailing considerations do we think that as a matter of policy, the applicant should be prevented from leading its evidence and making its submissions. We accept the applicant’s contention that important statutory rights are involved and that the Board should not lightly deny its right to a hearing on the merits – especially where, as here, it was not a party to the earlier proceeding and (unlike the employer in *Radio Shack*) it has never had the opportunity to put forward its position. We also accept the views of Professor Laskin that the first look at a problem is not necessarily the correct look. While as between the parties, it may be justifiable to hold that it is better that a matter be settled, than that it be settled right, we do not see any reason why this argument should be extended to strangers.

22. We do not wish to leave this matter without returning briefly to the views expressed by Professor Arthurs in *Wickett and Craig supra*. There, it will be recalled, he distinguished between the preclusive and persuasive effect of a previous decision; and while rejecting the former, held that a previous decision between the same parties should generally be followed unless it can be fairly distinguished or appears to be clearly wrong. This decision, of course, was made in an arbitration context, but the reliance interests and need for predictability and

objectivity in decisionmaking are equally applicable to proceedings before the Board. Cases and decisions do not stand alone; they are part of a continuum. The Board does not face each problem as a new and pristine blackboard never previously written on. As we have already pointed out parties can, and should, reasonably expect that if a decision have been rendered in an earlier proceeding which is related logically to a later one, the former must be taken into account. Decisions in earlier cases should not be undercut promiscuously by those in later cases. Later decisions should, unless there are overriding factors to the contrary, be consistent with those in earlier cases. Only in this way can respect for the system be maintained, and it is this which we take to be the true *ratio* of the Board decision in *Municipality of Metropolitan Toronto, supra*. From a common sense or practical point of view (and apart altogether from legal questions concerning onus or *res judicata*) the Board is unlikely to reach a different conclusion on an issue such as employee status unless there has been a change in the law or a significant change in the individual's duties and responsibilities since the matter was last considered. (See *Globe & Mail Ltd., supra*.)

23. For the reasons outlined above, the respondent's preliminary objection to proceeding with this application is dismissed. A Board officer will be appointed to examine into the duties and responsibilities of the individuals affected by this application, and report back to the Board.

0905-80-M Robert S. Zwicker, Applicant, v. Energy & Chemical Workers Union – Local 593, Respondent Trade Union, v. PCL Packaging Ltd. Respondent Employer.

Religious Objector – No religious prohibition against union membership – Whether applicant's personal religious conviction sufficient

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members, M. J. Fenwick and J. A. Ronson.

APPEARANCES: *Darren L. Michael, Q.C. and Robert S. Zwicker appearing for the applicant; Guy Beaulieu and Edwin Glen appearing for the respondent trade union; No one appearing for the respondent employer.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; October 6, 1980

1. This is an application under section 39 of *The Labour Relations Act*, seeking exemption from the union security requirements imposed by a collective agreement. The relevant provisions of section 39 are as follows:

“39. – (1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

- (b) objects to the paying of dues or other assessments to a trade union the Board may order that the provisions of a collective agreement of the type mentioned in clause *a* of subsection 1 of section 38 do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to any pay dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree than to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection 1 applies,

- (a) subject to clause *b*, to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into with that employer and only during the life of such collective agreement;" ...

The parties are now in the course of their first collective agreement, the relevant provisions of which read as follows:

"4.02 Every employee who is now or hereafter becomes a member of the Union shall maintain his membership in the Union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the Union, and maintain membership in the Union as a condition of his employment, provided that an employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the Union shall, as a condition of his employment, tender to the Union the periodic dues uniformly required to be paid by the members of the Union.

4.03 The Employer shall on a monthly basis, deduct from the wages due to all employees, and pay to the Union, the amounts of uniform dues, initiation fees, and/or assessments as designated by the Financial Secretary of the Union. Such deductions shall be made from the first pay in each month and shall be forwarded to the Secretary Treasurer of the Union or other properly designated official within 10 days after the date the deduction is made. The Employer shall furnish to the Union, with such payment, a list of the names of those employees for and on behalf of whom deductions have been made, their classifications, as well as additions to and deletions from the bargaining unit."

The applicant has been with the employer for some ten years, and accordingly, under the above

terms of the collective agreement, is not required to become a member of the respondent trade union. He is, however, at the very least required to pay dues, and possibly (based on Article 4.03) initiation fees and assessments as well.

2. The applicant is a member of the Seventh Day Adventist Church, and has been since 1954. While he indicates that the general teachings of the Church urge its members not to become members of trade unions, the applicant acknowledges that the Church does not in fact prohibit its members from doing so. Indeed, the applicant is aware that significant numbers of his fellow congregants are trade union members. He sees the question as one of individual choice and feels himself that it is sometimes necessary to "buck the current" to be consistent with one's principles. The applicant indicated that neither he nor his Church had any quarrel with the objectives of the trade union movement, insofar as the movement seeks to improve the lot of the working man. It is, however, the methods of trade unions generally which the applicant is unable to reconcile with his view of the Bible's teachings. In particular, he finds any form of confrontation inconsistent with the principles which he described for the Board. He is further of the belief, personally, that trade unions lead to communism, which he considers to be a threat to a Christian society. The applicant has made no investigation of the respondent trade union, nor does he direct any criticism towards the respondent in particular. His objection is based solely on his perception of trade unions as a whole. The applicant does not feel, therefore, that he can engage in any of the activities of a trade union, either directly, as a member, or indirectly, by lending financial support.

3. As indicated, the applicant became a member of the Seventh Day Adventist Church in 1954, and at that time was a member of the United Steelworkers of America, working at Stelco in Hamilton. He states that he resigned his membership in the union when he joined the Church, and at the same time had to resign from Stelco because his job would have required him to work on the sabbath. It is not clear from the evidence whether the applicant continued as a member of the Steelworkers for any time at all prior to resigning over his work schedule, but in any event, the Board would not consider it unusual to find that some alterations in an applicant's beliefs had taken place over the course of twenty-six years. The applicant does indicate, though without details, that he has encountered the present difficulty with trade unions at other jobs prior to this one, causing him to resign from that employment.

4. The applicant concedes that he was a major instigator of opposition to the respondent trade union, and even made a speech to employees in the cafeteria. At no time did he mention his religious convictions against the trade union. His appeal to other employees was based, rather, on what in his view the employer had already done for the employees, and the appropriate way to negotiate changes. The applicant's continuous overt resistance to the organizing efforts of the respondent trade union has understandably caused some skepticism on the part of the respondent concerning the present application, and the Board must in this situation be circumspect as well. The applicant testified, however, that as soon as the respondent began its efforts to organize the employer, he knew, from prior experience, that his "job was on the line". The Board does not find it curious that the applicant would not use his own religious convictions as a basis for an appeal to other employees, particularly when, as the applicant testified, his personal views were already well known. Having regard to the evidence as a whole, the Board is satisfied of the sincerity of the applicant's beliefs. The Board is also satisfied that those beliefs are essentially "religious" in nature, even though the applicant's concern over communism, for example, obviously has implications going beyond that sphere.

5. The rationale for section 39 of the Act is aptly set out in the *Sheraton-Connaught Hotel* case, [1972] OLRB Rep. March 249:

"3. In our society the assertion of one freedom may often conflict with the assertion of other freedoms. For example, because a trade union must by operation of law be the bargaining agent for and represent all employees in a particular bargaining unit, individual employees lose their freedom to contract on an individual basis with their employer. Inherent in section 39 of the Act is the recognition that the freedom to associate into trade unions for collective bargaining and the protection afforded to that freedom has come into conflict with freedom of religion.

• • •

5. Trade unions are also of the view that because they are obligated to represent all the employees in a fair and honest way and that in so doing they incur considerable expense that there is a responsibility on all who share in the benefit of this representation to contribute. Thus, trade unions that provide economic research, legal advice and expert advisors to employees feel that at the very least the employees who receive the benefit of such representation shall contribute to the expense of providing such benefits. 'Free riders' are considered an anathema by the trade union movement and by their dues contributing employees; the trade unions consider that the failure by employees to contribute what they consider to be their fair share of the expenses weakens the trade union movement and saps the strength of the concept of free association inherent in the legislation.

6. Whatever the merit of that particular issue the legislature of this Province has decided that on balance the interests of freedom of religion deserve consideration to the point of exemption from trade unions and has enacted section 39 to provide that persons with religious objections by order of this Board may not be required to become members of a trade union or to pay dues to the trade union. The legislature has not permitted these persons to become free riders, in the sense that persons exempted are required to pay an amount equivalent to union dues to a charitable organization.

7. The merits of the issue have thus been decided by the legislature. On balance it has opted for freedom of religion and it only remains for this Board to determine whether individuals comply with the legislation. This Board, and quite properly so, because the balance of freedoms in our democratic society is a matter for the legislature, is not given the authority under the statute to weigh the merits of the debate between freedom of association and freedom of religion. Our function is simply to determine whether an individual applicant comes within the meaning and intention of the statutory exemption."

6. Here the evidence of both the applicant and his minister establish that there is no prohibition imposed by the Seventh Day Adventist Church against joining or supporting a trade union. The applicant, however, has imposed that prohibition upon himself, because of his beliefs, and it is the applicant's own personal views which are before this Board. A similar

situation faced the Board in the *General Motors of Canada Limited* case, [1972] OLRB Rep. Feb. 133, where one of the trade union officials, a Mr. Semplonius, happened to be a member of the same spiritual organization, the Christian Reform Church, as the individual seeking exemption, and satisfied the Board that indeed the prevailing view in the Church did not oppose the joining of a trade union. The Board had this to say:

"11. However that may be, it is not the religious convictions or beliefs of a certain religious sect that must be determined under section 39 of the Act. The religious conviction or belief on which the objection must be based is the personal conviction or belief of the applicant and accordingly is a subjective matter. We are satisfied that the applicant objects to joining and supporting the respondent union because of his religious conviction or belief." ...

7. The Board should add that its approach to section 39 of the Act is not altered by the recent amendment of the Act in effect requiring the inclusion of a compulsory dues check-off clause in all collective agreements negotiated subsequent to the amendment. While the amendment appears to be a legislative endorsement of the principle that all members of the bargaining unit ought to share in the costs of the trade union, such requirement continues to be made expressly subject to the provisions of section 39.

8. The Board is satisfied on the evidence that the applicant because of his religious convictions, objects to the paying of dues, fees or other assessments to the respondent trade union. The applicant accordingly is granted the limited exemption from such obligation provided by the Act, and is directed instead to remit the equivalent amount to a charitable organization mutually agreed upon by the applicant and the respondent trade union. The Board shall remain seized in the event of a failure to reach agreement on a charitable organization.

DECISION OF BOARD MEMBER M.J. FENWICK:

1. I dissent.

2. I am not persuaded that Mr. Zwicker's application for exemption under Section 39 is motivated by religious conviction or belief. On the contrary I am satisfied that he is politically motivated against the union.

3. He testified that on two occasions he initiated an anti-union petition. On this last occasion he was unable to prevent his fellow workers from establishing a union.

4. His antipathy to unions is grounded in his assumption that unions and their activities lead to communism. When asked for his authority for such an allegation he named a prominent Toronto broadcaster.

5. He could not explain why he would accept as his mentor a broadcaster, who is a self proclaimed atheist and also a member of a number of unions.

6. Mr. Zwicker's pastor, whom he called as witness, did not agree that unions lead to communism.

7. The board must assess the sincerity and credibility of applicants in Section 39 applications to ensure that the legislative provision is not abused.
 8. I would dismiss the application.
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0310-79-R; 0445-79-R Christian Labour Association of Canada, Applicant, v. **Richmond Insulation Company** – Division of Joy Wise Insulation Limited, Wise Insulation Limited, Respondents, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Intervener; International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. **Richmond Insulation Company**, and Wise Insulation Limited, Respondents

Practice and Procedure – Witness – Witness unable to continue cross-examination – Called to meet requirements of sections 55(13) and 1(5) – Board weighing prejudice to parties – Whether evidence given admissible – Whether hearings continued

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *W. R. Herridge, Q.C., Y. Hamlin, J. Adema, R. Wright and Debra McAllister for Christian Labour Association of Canada; Ronald P. Leitch, Douglas B. Anderson and Joy Ann Wise for the respondents; B. Fishbein and J. Duffy for International Association of Heat and Frost Insulators and Asbestos Workers, Local 95.*

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; October 16, 1980

1. Board File No. 0310-79-R is an application for certification and Board File No. 0445-79-R is an application for a declaration that the respondent Richmond Insulation Company – Division of Joy Wise Insulation Limited (“Richmond”) is the successor employer to Wise Insulation Limited (“Wise”) as the result of a sale of a business within the meaning of section 55 of *The Labour Relations Act* or, in the alternative, a declaration pursuant to the Board’s discretion under section 1(4) of the Act that the two respondents be treated as one employer for purposes of the Act. Richmond Insulation Company is the style under which Richmond Insulation Limited carries on business. Following a hearing held June 11, 1979, before a differently constituted panel of the Board which dealt with certain procedural issues, an interim decision was issued June 13, 1979, in which it was directed that these files be consolidated.

2. Hearings into the merits of both applications started July 30, 1979, and continued on July 31st. Since the allegations on which the intervener (“Local 95”) is relying in its intervention in the application for certification also form the basis for the application in Board File

No. 0445-79-R insofar as it pertains to section 1(4) of the Act, the Board began by receiving the evidence of the respondents in respect of the section 1(4) and section 55 allegations pursuant to the respondent's obligation under sections 1(5) and 55(13) to adduce all facts material to the allegations. Mrs. Joy Wise, who is president and sole shareholder of Richmond and who was secretary-treasurer of Wise from its incorporation until June 1, 1979, testified in respect of both respondents but primarily in respect of Richmond. She was the first witness to be called. When the hearing was adjourned at the end of the second day she was in the midst of being cross-examined by Local 95's counsel. Her examination-in-chief had been completed and so had her cross-examination by counsel for the Christian Labour Association of Canada ("C.L.A.C."). Hearings were scheduled for continuation of these matters on September 12, 1979 and, if needed, on September 13th and 14th as well.

3. Neither of the Wises were present at the hearing on September 12th but they were represented by counsel. Counsel advised the Board that Mrs. Wise was under care of a doctor and incapable of testifying for at least three months. Counsel also advised the Board that Richmond Insulation Company had been dissolved effective September 7, 1979. Counsel had advised the other parties in writing of this turn of events and unsuccessfully sought their consent to an adjournment. This was still the situation at the commencement of the hearing on September 12th. Consequently the Board heard and considered the submissions of the parties on the request for adjournment and then adjourned the proceedings on certain conditions to be met by the respondents' counsel. These conditions were not satisfied and, at the request of counsel for C.L.A.C., the Board scheduled the applications for continuation of hearing on August 5th, 6th and 7th, 1980. These dates were set by the Registrar without consultation with any of the parties and a formal Notice of Hearing was sent to each party on July 7, 1980.

4. Counsel for the respondents advised the Board and counsel for the other parties by letter dated July 11, 1980, that he could not attend on August 5th and he was unable to contact the respondents regarding their attendance. By further letter dated July 22nd, counsel referred to the Board a letter dated July 17th from Mrs. Wise's physician which, counsel contended, indicated that the physician was prohibiting her from attending for health reasons. Counsel also advised the Board that his court schedule for September made it impossible for him to attend at the Board during that month.

5. In the absence of consent to adjourn the scheduled hearing, the Board proceeded with it on August 5th. The respondents neither appeared nor were represented. As a consequence, the Board entertained the submissions of counsel for the other parties as to how the Board should dispose of the applications in these circumstances. Upon receipt of their submissions, the Board reserved its decision and adjourned the hearing. The submissions of counsel and the Board's decision in these matters are set forth hereunder.

6. Counsel for C.L.A.C. submits that C.L.A.C. is entitled to have its application for certification adjudicated as to the date of application, since that is the date in applications pertaining to the construction industry for determining which persons are included in the bargaining unit being sought. Counsel contends, furthermore, that C.L.A.C. is entitled to that adjudication without further delay because it has been the Board's consistent practice to give precedence to and determine expeditiously applications for bargaining rights. Counsel characterizes Local 95's application as a "defense" against C.L.A.C.'s application which should not be permitted to delay further the Board's adjudication of C.L.A.C.'s application. Counsel argues that, while Mrs. Wise is testifying in order to meet Richmond's obligation under sections 1(5) and 55(13) and her inability to attend and complete her testimony is a problem in terms of meeting that

obligation and the purpose which it is intended to serve, in the end the burden of proof rests on Local 95. Although Mrs. Wise's cross-examination is incomplete, she has been extensively cross-examined and counsel submits that her evidence is admissible although the weight given to it by the Board in this circumstances may be slight. In this respect counsel relies on the following authorities:

- 1a) *Phipson on Evidence*, 12th ed., p. 656 at paragraph 1591 which reads:

"When the witness dies or falls ill before cross-examination, his evidence in chief is admissible though its weight may be slight.

- b) *R. v. Solomon and Thumbler*, (1958), 25 W.W.R. 307, wherein the court states at page 316:

"The mere inability to cross-examine does not necessarily render the examination in chief inadmissible as evidence."

Furthermore counsel contends that there are other competent witnesses available whose testimony could substitute for that of Mrs. Wise. Mr. Wise, who, as the former secretary of Richmond, is a person who is obliged (in keeping with the principle enunciated by the Board in *Canada Cement Lafarge Ltd. and Pointe Anne Quarry Company*, [1977] OLRB Rep. Jan. 5.) to inform himself of the facts material to Local 95's application. There is also a Mr. Wasley who advised Mrs. Wise from time to time on the operation of Richmond and who was hired in June 1979 by her to assist with the management of Richmond.

7. Counsel for Local 95 contends that the application for certification should be terminated because there is no longer any point to it; there is neither an employer nor any employees and therefore no bargaining unit. This latter reference is in regard to the representations of counsel for the respondents at the hearing held on September 12, 1979 that Richmond Insulation Company had been dissolved and had completed or otherwise disposed of any contracts which it had prior to that date; a situation now accepted as fact by counsel for both Local 95 and C.L.A.C. Counsel for Local 95 claims that Joy Wise Insulation Limited has amended its name to Joy Wise Investments Limited and deleted from its objects any reference to engaging in construction or insulation work. While this has not been proved as fact, it was not disputed by counsel for C.L.A.C. when the claim was made during the hearing on August 5th. Local 95 counsel cites as authorities for this contention the decisions of the Board in *Sarnia Board of Education*, [1969] OLRB Rep. Jan. 1025 and *N. DiLorenzo construction Limited*, [1965] OLRB Rep. Apr. 33. In the former decision, between the date of the application and the hearing into it, the respondent employer, Sarnia Board of Education, had been dissolved by statute. In the result, the Board dismissed the application stating:

"There is neither an employer nor a unit of employees for whom the applicant can be certified as bargaining agent."

In the latter decision, the Board had directed that a representation vote be held but that it be deferred until there were employees of the respondent in the bargaining unit. The Board ultimately terminated the application, with the concurrence of the applicant, because there were no employees for an extended period of time.

8. Should the Board not terminate C.L.A.C.'s application, Local 95's counsel con-

tends that the Board should proceed with both applications only when Mrs. Wise is available. Counsel maintains that she is not an ordinary witness but is the only witness that can satisfy Richmond's obligation under sections 1(5) and 55(13) that it "... shall adduce ... all facts within [its] knowledge that are material to the allegation." Furthermore, counsel's inability to complete cross-examination leaves crucial areas of evidence on which she has not been examined (including documents which the Board had directed be produced) such as who orders and pays for supplies for both respondents and whether the respondents share equipment in common. Without this witness' evidence counsel contends that he cannot know what case, if any, he must meet through his own witnesses. For this reason, it would also be unfair for Local 95 to have to proceed out of order and call its witnesses before it can complete Mrs. Wise's cross-examination. Therefore, the Board should proceed only when Mrs. Wise can testify or when there is evidence of permanent disability prohibiting her from testifying.

9. Counsel for C.L.A.C. rebuts the submission that its application should be terminated because there is neither an employer nor any employees. Counsel argues that the same employees who were at work on the date when it was made (May 15, 1979) continued to be employed by Richmond until September 7, 1979, but more importantly they were at work on the date of the application and that is the critical date for an application for certification in the construction industry. It is as of that date which C.L.A.C. contends its application should be adjudicated. While C.L.A.C. admits that it might be unable to exercise the bargaining rights which would be established by the Board's certificate if Richmond does not resume business, it contends that it should have the bargaining rights in case Richmond should resume business or in the event that an alleged successor employer emerges.

10. The Board does not accept the contention of counsel for Local 95 that C.L.A.C.'s application for certification should be terminated. The Board finds this case readily distinguishable from the *Sarnia Board of Education* case, *supra*. In *Sarnia* the employer was legislated out of existence and could only be restored to life by an act of the legislature. The actions which are alleged to have eliminated the employer in this case were the voluntary actions of the owner of Richmond and are quickly reversible by voluntary action. Moreover, C.L.A.C. is adamantly opposed to termination of its application equally adamant to it being properly adjudicated by the Board. That stand of C.L.A.C. distinguishes this case as well from *Di Lorenzo*, *supra*. In that case, when it became evident that there may not be any employees in the reasonable future amongst whom a representation vote could be held, the applicant consented to the termination of its application. On the other hand, in *Shane Distributor Limited*, [1970] OLRB Rep. Jan. 1225, where an application for certification, filed on December 4, 1969 in respect of employees of Shane, was heard by the Board on January 8, 1970 after Shane had ceased doing business on December 31, 1969, the Board stated that since

"... the Board dealt with applications for certification as of their date of making ... [the applicant] was entitled to certification provided that it had the required evidence of membership."

Finally, in *Airline Footwear*, [1968] OLRB Rep. June 277, it was claimed that the employer's business had been dissolved. The Board refused to dismiss the case because the applicant requested that the Board inquire into whether the respondent's operations had genuinely been discontinued or whether they simply had been transferred to another name. The Board finds the circumstances of the instant case to be more analagous with those in the *Shane* and *Airline* decisions, *supra*, and adopts the reasoning in those cases in refusing Local 95's request to terminate the application for certification.

11. The remaining submissions of both counsel confront the Board with two problems, an evidentiary problem and a fairness problem. The evidentiary problem arises if the Board should decide to proceed with and conclude this matter without Mrs. Wise having been able to complete her testimony. There are two aspects to the problem. The first aspect is what to do with her testimony; that is, should it be admitted and, if admitted, the weight that should be given to it. The second aspect is what effect might the decision to proceed without Mrs. Wise have on Richmond's ability to satisfy its obligation to adduce the facts material to Local 95's allegation and on Local 95's entitlement to those facts. The problem of fairness arises in respect of each party's entitlement to a fair hearing and the effect on that entitlement of a decision to proceed or not to proceed.

12. Turning first to the evidentiary problem, the Board is of the view that consideration of this problem may affect how the Board would conduct the hearings should it proceed with the case, but the problem should not be a factor in determining whether to proceed, except insofar as it may impact on the problem of fairness. The Board always has a duty to decide the admissibility of evidence and the weight to be given to it when the Board is hearing and deciding those matters which come before it. The fact that the circumstances of Mrs. Wise's testimony add a note of complexity is no reason for not proceeding. A similar duty applies in respect of any problems which those same circumstances might create in respect of Richmond meeting its obligations under sections 1(5) and 55(13). Again, the fact that the Board's duty might be more difficult to discharge is insufficient reason to not proceed. If the Board does proceed, it would be guided by the same principles and procedures which guided it in the *Canada Cement Lafarge Ltd. and Pointe Anne Quarry Company* case, *supra* and which are set out as follows in paragraphs 15 and 16 of that decision:

"We believe that similar principles and procedures should apply under sections 1(5) and 55(13). The obligation to adduce material facts is upon the respondent, and the witness or witnesses chosen by it should tender their evidence-in-chief. Except in exceptional circumstances (e.g., where the respondent is unrepresented), we do not believe that it is desirable for the Board to conduct the inquiry. Nothing in the recent amendments causes us to disagree with the observation of the Board in the *Super City Discount Foods* case, *supra*, that "It is not for the Board . . . to undertake an inquiry of its own in the matter." There may be situations where members of the panel may wish to question witnesses to have testimony clarified or amplified. However, generally speaking, it is desirable that the carriage of the proceedings be left to the parties.

Once the respondent has completed its evidence, the applicant may wish to contend that the initial obligation to adduce all material facts has not been met. In such cases, an applicant may, at that stage, ask the Board to direct compliance. In most instances, however, it would seem to us that the applicant should proceed with its cross-examination. If, in cross-examination, the witness is unable, or unwilling, to respond to questioning, and if the applicant can persuade the Board that the answer sought is likely to be material to the issues in dispute, the applicant is entitled to seek a direction from the Board requiring that the information be supplied, either by the witness informing himself or by the respondent producing the information through another witness . . . It may be noted

that there is nothing to prevent an applicant from calling evidence to add to, vary or contradict the testimony of the respondent's witnesses.".

Indeed, Local 95 availed itself of these principles and procedures to have the Board direct Mrs. Wise to produce certain documents as stated earlier in this decision.

13. The more difficult issue for the Board to deal with is the parties' rights to a fair hearing. Since it was on request of counsel for the respondents that the Board granted consent for the original adjournment and in the absence of any later submissions to the contrary, the Board assumes that any problem in respect of rights to a fair hearing would arise only if the Board proceeds with these matters. In the event that the Board does proceed, there would be little or no prejudice to Wise. While some of Mrs. Wise's testimony was in respect of Wise, Gary Wise, her husband, is president and sole shareholder and absent any contrary indication would be a competent witness for Wise. He was also secretary of Richmond from its incorporation until May 10, 1979. Counsel for the respondents contends that there is potential prejudice to Richmond in proceeding without Mrs. Wise being available because no one else in either Richmond or Wise possesses the knowledge or information of the two respondents that Mrs. Wise possesses. Even if that claim is accepted at face value, it does not establish that Richmond is not without the means to limit any prejudice with might result from Mrs. Wise not being able to testify. In the Board's view, there are other sources of witnesses for Richmond. It can make its books of record available to Mr. Wise, for example, who was an officer of Richmond until one week before Local 95 made its application and who, therefore, can inform himself from those records so that he could testify for Richmond. There are customers for whom work was performed and persons who were employed by Richmond to perform that work and there are legal means to cause them to appear and give testimony.

14. While Local 95 contends that any delay in disposing of its request for a section 1(4) or section 55 declaration prejudices its attempt to protect its bargaining rights for employees of Wise, it prefers to have its application adjourned until Mrs. Wise is available to complete her testimony because it apprehends a greater prejudice to its interests from proceeding without being able to complete her cross-examination. Therefore, the Board will consider the issue of fairness in respect of Locals 95's interests only from the aspect of proceeding with these matters. There is clearly a greater risk of prejudice to Local 95 than to Richmond if the Board proceeds without Local 95 being able to complete its cross-examination of Mrs. Wise, if only for the reason that she may be the only person having care and custody of the documents which Local 95 considers material to its case, including those which the Board has directed Mrs. Wise to produce. While there are legal means by which Local 95 can assure production of the records, it could well find itself attempting to prove the documents and examine them through its own witness rather than through cross-examination of a witness for Richmond. This is one of the difficulties which sections 1(5) and 55(13) were intended to overcome (see *Canada Cement, supra*). On the other hand Local 95 has had the benefit of Mrs. Wise's testimony to date and thus has some knowledge of Richmond's operations, its customers and employees, so Local 95 is in a more knowledgeable position in terms of the case that it may have to meet than it was at the outset. Whenever the Board proceeds with Local 95's application, Local 95 bears the burden of proving its allegations. Whether Mrs. Wise completes her testimony does not alter that situation, nor does it alter Local 95's right to call evidence of its own to add to, vary or contradict the respondent's evidence, although the need to do so may be greater if Mrs. Wise cannot complete her evidence. Having regard to the foregoing, the Board views the risk of prejudice from proceeding to be greater for Local 95 than for either of the respondents.

15. The Board cannot adjudicate C.L.A.C.'s application for certification until the Board determines whether Local 95 has bargaining rights for the persons who are affected by C.L.A.C.'s application. Therefore, C.L.A.C. is clearly prejudiced by the delay resulting from further postponements of Local 95's application. In our view, the prejudice to C.L.A.C. which will result if the Board were to delay this matter further outweighs the risk of prejudice to the other parties if the Board continues with these proceedings.

16. Having regard for all of the foregoing and to the time elapsed since the case was first adjourned, the Board is satisfied that the best balancing of the parties' rights to a fair hearing would result from continuing the hearing into these matters. The Board is satisfied, also, that the lawful collective bargaining interests of the parties will, on balance, be served best by proceeding and determining the issue raised by these applications. Having further regard for the time already elapsed, the Board considers it appropriate to set peremptory hearing dates in these matters. Accordingly, the Board fixes November 18, 1980 as the hearing date for continuation of these matters and, if needed, November 19 and 20, 1980 as well.

17. The parties should be prepared to proceed on those dates whether or not Mrs. Wise appears to testify. Therefore any party that is concerned with the *bona fides* of Mrs. Wise's illness and her ability to attend on the dates set for hearing should take the necessary steps to establish or challenge those *bona fides* according to its interests.

DECISION OF BOARD MEMBER O. HODGES:

The decision of Mr. Hodges will follow.

0912-80-R Teamsters, Local Union No. 647, Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Silverwood Dairies**, Division of Silverwood Industries Ltd., Respondent, v. Borden Dairy, Division of The Borden Company, Limited, Intervener #1, v. Retail, Wholesale and Department Store Union Local 440, A.F.L., C.I.O., C.L.C., Intervener #2.

Bargaining Rights – Bargaining Unit – Sale of a Business – Purchaser closing business and transferring employees – Subsequently purchasing competitor’s business – Whether bargaining rights of union continuing after purchaser closing business and transferring employees – Vendor employees’ union bargaining rights continuing after sale – Some intermingling of employees by purchaser after acquisition – Conflict over bargaining unit descriptions – Board amending unit description – Whether vote ordered – Number of employees from each union relevant factor.

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Ken Petryshen and Gerry Kennedy for the applicant; B. F. MacDonald and T. F. Kotschorek for the respondent; no one appearing for intervener #1; Albert Player and Albert Scott for intervener #2.*

DECISION OF THE BOARD; October 14, 1980

1. This is an application under section 55 of *The Labour Relations Act*. The applicant trade union (“Local 647”) contends that following a sale of a business within the meaning of section 55 by intervener #1 (“Borden”) to the respondent (“Silverwood”), the purchaser intermingled some of the employees of its pre-existing milk and ice cream distribution business with the employees of the purchased business.

2. The facts of this case are not in dispute. Silverwood operated a wholesale milk and ice cream distribution business in Windsor for many years. Local 647 was the bargaining agent for a bargaining unit of Silverwood employees described as follows in Article 1 of the Collective Agreement in force between the trade union and Silverwood from May 1, 1978 to April 30, 1980:

“...all employees of the Company employed at its Windsor Branch Plant, save and except Supervisors, Foremen, persons above the rank of Supervisor and Foreman, Engineers, Office and Retail Store Staff, and students employed for less than 90 days.”

3. On or about February 11, 1980, the seventeen employees in that bargaining unit were advised by Silverwood that the Windsor Branch Plant would be closed indefinitely effective February 16, 1980. This was subsequently confirmed by letter dated February 18, 1980. Accordingly, the employment of each of the seventeen employees in the bargaining unit was terminated effective February 16, 1980, but the eight employees with the most seniority

were offered positions with Silverwood at its Chatham Plant, where Local 647 held bargaining rights under a separate collective agreement, in force from December 1, 1978 to November 30, 1980, for the following bargaining unit:

“...all employees of the Company employed at or working out of its plant in Chatham, save and except Plant Superintendent, Chief Engineer, Sales Managers, Route Foremen, Foremen, persons above the rank of route foreman and foremen [sic], office staff, persons regularly employed for not more than 24 hours per week, and students employed for less than 90 days.”

As of February 18, 1980, those eight employees began to service the Silverwood accounts from Chatham, by obtaining their milk and ice cream in Chatham instead of Windsor. The ice cream delivery routes remained unchanged, but the milk routes were modified.

4. By letter dated February 21, 1980, Local 647 gave Silverwood notice to bargain in respect of the Silverwood Windsor Branch Plant Collective Agreement. However, Silverwood and Local 647 subsequently agreed not to enter into negotiations due to the closure of that plant.

5. On March 1, 1980, Silverwood purchased Borden's Windsor milk and ice cream wholesale distribution business. It was common ground among the parties that this transaction was a sale of a business within the meaning of section 55 of the Act. It was also common ground that, by virtue of section 55(1), as of March 1, 1980, Silverwood became bound by the collective agreement between Borden and intervener #2 (“Local 440”). Article 2 of that Collective Agreement, effective from June 1, 1979 to May 31, 1982, recognizes Local 440 as the bargaining agent for the following bargaining unit: “all of the Company's employees of the Windsor Plant, save and except office staff, route supervisors, retail store clerks, seasonal or part-time employees, foremen and those above the rank of foreman.”

6. Between February 18, 1980 and July 20, 1980, the number of former Windsor employees working for Silverwood in Chatham dropped from eight to five. On July 21, 1980 Silverwood integrated that part of its Chatham-based wholesale milk and ice cream distribution business which serviced Windsor area accounts, with the Windsor wholesale milk and ice cream distribution business which it had purchased from Borden. In so doing, it transferred those five employees back to Windsor and integrated them and their customers into the Windsor wholesale milk and ice cream distribution business which it had purchased from Borden. As a result, the work force of that business rose from sixteen to twenty-one employees.

7. Local 647 submitted that an intermingling of employees had occurred within the meaning of section 55(6) of the Act, which provides:

“55(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board

may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement."

Local 647 further contended that the intermingling had resulted in a conflict between its bargaining rights and the bargaining rights of Local 440. Local 647 requested the Board to resolve that conflict by directing that a representation vote be taken of the Silverwood employees, including part-time employees, in the bargaining unit specified in the collective agreement referred to in paragraph 2 hereof, between Local 647 and Silverwood.

8. The respondent agreed that an intermingling had occurred and that a representation vote should be held. However, the respondent submitted that part-time employees should be excluded from the voting constituency since, as noted above, part-time employees are excluded from the Local 440 Collective Agreement referred to in paragraph 5 of this decision.

9. Local 440 contended that no intermingling had occurred. In support of that position, it was argued that the closure of the Silverwood Windsor branch plant on February 16, 1980, terminated the relationship between Silverwood and Local 647 in the Windsor area. The agreement between Local 647 and Silverwood not to enter into negotiations for the renewal of their Collective Agreement was cited as proof that the relationship had been terminated. Local 440 also submitted that the re-employment of five employees at another Windsor plant owned by the respondent five months after the closure of its original plant does not constitute intermingling within the meaning of section 55. Therefore, Local 440 requested the Board to declare under section 55(6)(c) that Local 440 is the bargaining agent of the employees of the respondent at its Windsor plant. In the alternative, Local 440 submitted that if the Board found that an intermingling had occurred and directed that a representation vote be taken, the voting constituency should be the one advocated by the respondent.

10. The Board is of the view that the bargaining rights of Local 647 were not terminated by the closure of the pre-existing Silverwood Windsor branch plant or by the agreement between Local 647 and Silverwood not to enter into negotiations. Once a trade union has given notice of its desire to bargain pursuant to section 45 of the Act, its bargaining rights remain in existence until they are terminated by the Board under the termination of bargaining rights provisions of the Act (such as section 51(2)), or lost under the principle of abandonment.

The continued existence of bargaining rights in such circumstances has been implicitly recognized by the Board in a line of cases in which it had been held that an application for termination of bargaining rights under section 51 (on the basis of failure to bargain) will generally be dismissed where there are no employees in the bargaining unit because such application presumes the presence in the unit of employees who may signify whether or not they wish the trade union concerned to continue to represent them: see *Pattern Makers Association of Hamilton and Vicinity*, [1967] OLRB Rep. Oct. 652; *Scarborough Public Library Board*, [1968] OLRB Rep. May 196; and *Sentry Department Stores Limited*, [1969] OLRB Rep. Jan. 1039. In dismissing the application in the *Pattern Makers* case, *supra*, the Board specifically noted that the employer had closed its operation and had no intention of reopening it, and further noted that the respondent trade union had advised the Board that it did not intend to seek to bargain with the applicant employer until such time as the applicant employed persons from whom the respondent was the bargaining agent.

11. There was no suggestion that Local 647's bargaining rights have been terminated by the Board. Thus, the issue is whether Local 647 abandoned its bargaining rights. Although some doubt has been expressed from time to time concerning the power of the Board under *The Labour Relations Act* to find that bargaining rights have been abandoned (see, for example, *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568, paragraph 13), the Board has confirmed and applied the abandonment principle in several recent cases; see, for example, *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110, in which the Board stated:

"4. Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC ¶18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O & W Electronics Limited*, [1970] OLRB Rep. Jan 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N. W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128)."

See also *Entwistle Construction Limited*, [1979] OLRB Rep. March 211; *Hugh Murray Limited*, [1979] OLRB Rep. July 664; and *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096.)

12. Abandonment of bargaining rights can occur by neglect or by deliberate act of relinquishment. Where a trade union allows a collective agreement to expire and sleeps on its bargaining rights for a sufficient length of time, the Board may find that those rights have been abandoned through neglect. (See, for example, *Dominion Milton Limited*, [1963] OLRB Nov. 13, in which abandonment was found to have occurred where a trade union had made no attempt to negotiate a collective agreement for five years and failed to intervene in a certification application filed by another trade union. See also *N. W. Clayton Sheet Metal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69, in which the failure by a trade union to exercise its bargaining rights during a one year period following the expiry of its collective agreement, in combination with its failure to administer that agreement during the preceding three years of its operation, was found to constitute abandonment.) However, such cases generally involve a much longer period of time than the five months which passed in the present case between the date on which Silverwood and Local 647 agreed not to enter into negotiations and the date on which the present application was filed by Local 647. In *Ouellette & Rochefort Ltd.*, [1971] OLRB Rep. April 218, in response to an argument that the Board should find that a trade union had abandoned its bargaining rights because approximately one and one-half years had elapsed since the trade union had sought to bargain with the employer, the Board "had particular regard to the fact that the time period involved. . . [was] marginal" and was "therefore not prepared to find that the respondent [had] abandoned its bargaining rights. . ." Moreover, none of the abandonment cases appear to have involved a situation such as the present one in which the closure of a plant by the employer made negotiating for a new collective agreement for the plant a fruitless exercise with no practical value.

13. Bargaining rights can also be explicitly abandoned by a deliberate act of relinquishment. Although the decision by Local 647 not to enter into negotiations due to the closure of the Windsor branch plant is consistent with relinquishment of its bargaining rights, it is also consistent with merely holding such rights in abeyance until such time as an opportunity for their further utilization might arise through the reopening or relocation (at another Windsor site) of the Windsor branch plant. Accordingly, the Board does not view this equivocal course of conduct as an explicit abandonment by Local 647 of the bargaining rights in question.

14. Accordingly, having regard to all the circumstances of this case, including the fact that Local 647 asserted its bargaining rights by filing this application on July 30, 1980, less than ten days after the employees in question were transferred to Windsor, the Board finds that Local 647 did not abandon its bargaining rights for the Silverwood Windsor branch plant.

15. Where the sale of a business is associated with the geographic transfer of employees, the Board has indicated that a trade union whose bargaining rights are geographically restricted will not find itself in a better position under section 55 than it would have been in if the employer had simply relocated his business in another geographic area. In *Chateau Gardens (Queens) Inc.*, [1979] OLRB Rep. Apr. 289, which involved the purchase of two nursing homes located in Strathroy and the transfer of employees by the respective purchasers to two London nursing homes owned by the purchasers respectively, the Board stated at paragraph 9:

“...It is clear that if the two Strathroy employers had not sold their respective businesses but had moved them from Strathroy to London, that is, from the geographic area covered by the certification or collective agreements to a different geographic area, the bargaining rights, in the absence of contractual language to the contrary, would not follow. The situation where a sale involves a movement out of the geographic area and bargaining unit defined in the collective agreement into another geographic area by reason of a sale was referred to by the Board in *Mountain View Dairy Ltd.*, [1967] OLRB Rep. Feb. 911. In that case, although the Board pointed out that the case was not disposed of on that ground, the Board did suggest that the position of a bargaining agent under a sale should not be better than it would be where an employer relocated his business in a new geographic area.”

The unions which respectively held bargaining rights for the employees at the two nursing homes in Strathroy submitted that intermingling had occurred and that the Board should exercise its discretion to order a two-way vote among the employees. In support of that position, it was argued that since there were no geographical limitations set out in section 55, the Board ought not to introduce them. However, after considering those submissions, the Board was “of the opinion that the result suggested in the *Mountain View Dairy* case, *supra* ought to be applied”. Accordingly, the Board, in the exercise of its discretion under section 55, declared that the trade unions which respectively held bargaining rights at the two Strathroy nursing homes were not the bargaining agents for any of the employees at the nursing homes in London.

16. In *Mountain View Dairy, supra*, Oakville Dairy, which had a collective agreement with a local of the Teamsters for the Oakville area (including employees at Oakville and Waterdown), purchased Mountain View Dairy, which had a collective agreement with a local of the Retail, Wholesale and Department Store Union for employees at Dundas. Oakville Dairy then moved the business which it had purchased from Dundas to Waterdown. In an application under section 55 by the later local, the Board stated at paragraph 4:

“it must be noted, although no argument was made on this point, that the bargaining rights held by Retail Wholesale were for employees of Mountain View at Dundas (a fact which was drawn to the attention of the parties at the hearing), whereas the operations, with respect to which it claims to represent employees, have been moved to Waterdown. Had there been no sale, but had Mountain View simply moved the base of its own operations from Dundas to Waterdown, it would seem that the bargaining rights of Retail Wholesale would not continue, except by the agreement of the parties. Retail Wholesale could not be in a better position in this case, where Oakville Dairy, having purchased the business of Mountain View, moved its operations to Waterdown....”

17. Thus, the Board’s jurisprudence indicates that if bargaining rights are limited to one geographic location, the transfer of employees to another location as a result of a sale will not lead to a transfer of bargaining rights to that location, nor will the transfer of employees from the former location into another trade union’s bargaining unit at another location be considered an intermingling; rather it will be treated as an accretion to the other trade union’s

bargaining unit, to which section 55(6) is inapplicable. However, if the scope clause in the predecessor's Collective Agreement would have been broad enough to cover the employees at the new location if the predecessor itself had moved its business there, section 55(6) will apply to an intermingling of employees at the new location following a movement of the business to that new location by the successor employer. See, for example, *Canadian Trailmobile Limited*, [1969] OLRB Rep. Jan. 1077, in which the successor company ("Trailmobile"), which had a collective agreement with the U.A.W. for its pre-existing business in Etobicoke, purchased a business in Rexdale from Brantford Trailer and Body Limited ("Brantford") which had a collective agreement with another trade union (the "Molders"). Approximately six weeks later, the purchaser decided to consolidate its activities by closing the Etobicoke plant and transferring all equipment, stock and inventories from that plant to the plant which it had purchased in Rexdale. Since the U.A.W. Collective Agreement contained a "transfer of operations" provision by which Trailmobile agreed that if it should transfer its operations to another location, the Collective Agreement would continue in full force and effect and the U.A.W. would be the bargaining agent at such new location, the Board found the situation to be distinguishable from the *United Dairy* case:

"7. Had there been no transaction between Brantford and Trailmobile and had Trailmobile simply moved its service branch from Etobicoke to Rexdale (or to any other location in Ontario) it would have an obligation to UAW to carry out the terms of the 'Transfer of Operations' agreement. This is distinguished from the facts in the *United Dairy Case*, O.L.R.B. Monthly Report, February 1967 page 911 where the applicant did not have any bargaining rights with respect to the employees of Mountainview Dairy at Waterdown and in that situation the majority of the Board said at page 912:

'It should seem that the bargaining rights of Retail, Wholesale would not continue except by agreement of the parties. Retail, Wholesale could not be in a better position in this case, where Oakville Dairy, having purchased the business of Mountainview moved its operations to Waterdown'.

In the present case there is an agreement of the parties to continue their relationship where such operations are transferred.

• • •

9. Having found that UAW has an interest in, or colour of right to represent Trailmobile employees at Rexdale, in order to come within the Act, there must also be found intermingling of employees. Employees of Brantford at Rexdale were given notice of termination on August 1st. Subsequently, most of these former employees of Brandford became employees of Trailmobile for whom the Molders asserted its bargaining rights under section [55(2)] of the Act. Trailmobile employees at Etobicoke were given notice of their termination of employment effective September 27th, 1968 and following September 30th some of these persons were hired at Rexdale but in fact, again by Trailmobile, the same

employer then was involved in both locations with a number of its employees at Etobicoke and the remainder being former employees of Brantford who sometime after August 1st became employees of Trailmobile. The manner in which this transfer of operations was effected by Trailmobile does not preclude the fact that in substance its employees in one business were intermingled with those of another business. We therefore find that there was an intermingling of employees within the meaning of section [55(6)] of the Act.”

18. Accordingly, the Board’s jurisprudence demonstrates that the Board has consistently interpreted section 55 in such manner as to preserve but not extend existing bargaining rights. Although most of the reported cases involve movement by the successor employer of the purchased business, *Canadian Trailmobile, supra*, demonstrates that similar principles are applicable to movement by the successor employer of its original business following the purchase of another business. A trade union with bargaining rights limited by geographic location for the original business of the successor employer ought not to be in any better position if the business is moved away from that geographic location in order to amalgamate it with a business purchased in another location, than it would be in if that business had merely been moved to the new location without any such amalgamation. Accordingly, in such circumstances the Board must consider the scope of the bargaining rights contained in the Collective Agreement for the original business in order to determine whether the new location is within that scope. If it is, then an intermingling at that location of employees of the original business with employees of the purchased business can be dealt with by the Board under section 55(6).

19. The Board is of the view that the present case is more analogous to *Canadian Trailmobile, supra*, than to *Mountain View Dairy, supra*, and *Chateau Gardens, supra*. If Silverwood had simply moved its pre-existing business from its former location in Windsor to the location in Windsor at which the plant purchased from Borden is located the bargaining rights of Local 647 would have continued because the operation, although situated in a new location, would nevertheless have continued to be the “Windsor Branch Plant” within the meaning of the recognition clause set forth in Article I of the Collective Agreement referred to paragraph 2 hereof. Similarly, if Silverwood had moved its original business from Windsor to Chatham and then moved it back to Windsor, Local 647’s bargaining rights (under the Windsor Branch Plant Collective Agreement) which would have been in abeyance while the business was being operated in Chatham, would have been reactivated by the return of the business to Windsor.

20. Although Local 647 would not have been entitled to assert bargaining rights for the employees in question under the Silverwood Windsor Branch Plant Collective Agreement while they were working out of Chatham, Local 647’s bargaining rights for employees at Silverwood’s original Windsor plant would undoubtedly have entitled it to bargain on behalf of any employees transferred back to that plant from Chatham. Thus, the present case is distinguishable from the *Chateau Gardens* case on the basis that in *Chateau Gardens*, the unions which respectively held bargaining rights for the employees at the nursing homes in Strathroy had no bargaining rights for persons employed in London, the place to which the employees in question were transferred; by way of contrast, Local 647 did have bargaining rights for persons employed by Silverwood at its original Windsor plant. Thus, if Silverwood had simply reopened its original Windsor plant and transferred the employees from its

Chatham plant to that plant, Local 647 would have had bargaining rights for the employees in question under Article 1 of the Collective Agreement referred to in paragraph 2 hereof. Similarly, Local 647 can legitimately assert a claim for bargaining rights for persons employed by Silverwood in Windsor at the former Borden plant since that plant, as a result of the closure of Silverwood's original Windsor plant, the purchase by Silverwood of the Borden plant in Windsor and the subsequent integration of employees and accounts, has in effect become the "Silverwood Windsor Branch Plant" within the meaning of Article 1 of that Collective Agreement. Moreover, as in the *Canadian Trailmobile* case, *supra*, the manner in which this transfer of operations was affected by Silverwood does not change the fact that in substance its employees in one business were intermingled with those in another business.

21. Accordingly, having regard to the agreed facts and the submissions of the parties, the Board finds that an intermingling occurred within the meaning of section 55(6) when Silverwood transferred to Windsor on July 21, 1980 its Chatham-based wholesale milk and ice cream distribution operations which serviced Windsor area accounts, and integrated those operations with the Windsor wholesale milk and ice cream distribution business which it had purchased from Borden on March 1, 1980.

22. The fact that an intermingling does not occur until several months after a sale of a business does not preclude the Board from granting relief under section 55(6). See, for example, *Avondale Dairy Limited*, *supra*, in which the Board ordered a representation vote as a result of an intermingling which occurred 3 months after the sale. See also *The Bryant Press Limited*, [1972] OLRB Rep. Apr. 301, in which a vote was ordered as a result of intermingling which commenced approximately 1 month after the sale but "largely took place" more than 6 months after the sale and was not completed until 7 1/2 months after the sale.

23. As noted above, the parties are not in agreement concerning whether part-time employees should be entitled to vote in the event that the Board orders a representation vote. The applicant submits that part-time employees should be entitled to vote while the respondent and Local 440 share the opposite view. The Board has wide powers with respect to determining bargaining units and voting constituencies in cases arising under section 55(6), as indicated by section 55(6)(d) and section 55(8). In exercising those powers, it is desirable that the determination should be, subject to any exceptional circumstances that may exist in particular instances, consistent insofar as possible with the overall practice of the Board with respect to the determination of appropriate units (see *Mammy's Wonder Bakeries*, [1969] OLRB Rep. March 1324). Where there is a history of hiring part-time employees, the Board generally excludes that group from a full-time bargaining unit at the request of either party (see, for example, *Inter-City (Bandag) Limited*, [1980] OLRB Rep. March 324). Although the information provided to the Board concerning this aspect of the case was rather limited, it appears that Borden employed part-time employees at its Windsor plant and that Silverwood, as Borden's successor, maintained that practice. As indicated above, part-time employees are excluded from the bargaining unit set forth in the Local 440 Collective Agreement. Thus, Local 440 cannot and does not claim to represent any of the part-time employees in the intermingled work force. However, part-time employees are not excluded from the Local 647 Silverwood Windsor Branch Plant Collective Agreement. Although there is nothing before the Board which indicates whether Silverwood ever hired part-time employees at its pre-existing Windsor branch plant, it is clear that all of the persons transferred from Chatham to Windsor by Silverwood on July 21, 1980, were full-time employees. Thus, Local 647 did not represent any of the part-time employees in question prior to the intermingling.

24. If a substantial number of part-time employees in the intermingled groups had been represented by Local 647 prior to the intermingling, it might have been appropriate for the Board to direct that a representation vote be taken to permit such employees to indicate whether they wish to be represented by Local 647 or wish to remain unrepresented by a trade union (see *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 167, paragraph 21). If Local 440 had also represented a substantial number of such part-time employees, it might have been appropriate for the Board to order a representation vote to permit such employees to choose which of the two trade unions would be their bargaining agent (see the *Bermay* case, *supra*, at paragraph 20). However, in the instant case, none of the part-time employees in question was represented by either trade union prior to the intermingling; accordingly, it is appropriate for the Board to exercise its powers under section 55(6) to preserve the non-unionized status of those part-time employees.

25. Accordingly, having regard to all the circumstances:

- (i) The Board determines that the employees affected by the application constitute two appropriate bargaining units, namely:

Bargaining Unit #1:

All employees of the respondent at its Windsor plant, save and except foremen, those above the rank of foreman, supervisors, engineers, office staff, retail store staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period;

Bargaining Unit #2:

All employees of the respondent at its Windsor plant regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, those above the rank of foreman, supervisors, engineers, office staff, and retail store staff.

- (ii) The Board declares that neither Local 647 nor Local 440 shall be the bargaining agent for the employees in bargaining unit #2.
- (iii) The Board hereby amends the respective bargaining units set forth in Article 1 of the Local 647 Silverwood Branch Plant Collective Agreement (referred to in paragraph 2 of this decision) and Article 2 of the Local 440 Borden Windsor Plant Collective Agreement (referred to in paragraph 5 of this decision) so as to substitute bargaining unit #1 for the respective bargaining units set forth in those collective agreements.

26. The Board must now determine whether a representation vote should be taken of the employees in bargaining unit #1. Where an intermingling has occurred within the meaning of section 55(6) and some of the intermingled employees are represented by one trade union while others are represented by another trade union, the Board has a discretion to direct that a

representation vote be taken to enable the intermingled employees to choose which of the two trade unions will be their bargaining agent. However, where there is a large disparity in the size of the intermingled groups of employees, the Board will generally not direct that a representation vote be taken, but rather will declare that the trade union representing the great majority of employees is to be the bargaining agent for the new bargaining unit. In the *Alliance Dairy* case, [1966] OLRB Rep. Aug. 336, sixty-nine former employees of the predecessor company were intermingled with four hundred and thirty employees of the successor company. Thus, there was a total of four hundred and ninety-nine employees in the bargaining unit, 14 per cent of whom were former employees of the predecessor company. In dealing with the request by the trade union which had formerly represented those sixty-nine persons, the Board stated:

"4. In the majority of cases which have come before the Board pursuant to [the predecessor of section 55], it has not been necessary, nor has it been requested that a representation vote be conducted. In virtually all of those cases in which a vote has been conducted, there was agreement between the parties that a representation vote was proper. In particular reference may be made to *The Belton-Quinn Lumber Limited* case, [1965] OLRB Rep. August 373, and *The Roman Catholic Separate School Board for the City of Windsor* case, Board File No. 11385-65-M. In each of those cases roughly one third of the employees in the new bargaining unit had formerly been represented by the applicant trade union. It was not necessary for the Board to set our criteria as to the propriety of a representation vote in view of its reliance on the agreement of the parties in those cases.

5. The purpose of [the predecessor of section 55] is subject to the provisions set out in the section, to continue the bargaining unit where the employer has sold his business. Bargaining rights thus are protected in the interest of stability in collective bargaining relationships. Where two or more bargaining units are, as the result of a sale and the intermingling of employees, merged into one, as in the instant case, both the need for stability in collective bargaining relationships and plain common sense would require that, where there is a large disparity in the size of the two groups of employees, there would be no representation vote, with its necessary expense, propaganda and disruption, but rather a declaration should be made that the trade union representing the great majority of the employees is to be bargaining agent for the new bargaining unit. All the parties were agreed that no criteria existed by which a 'large disparity' or 'great majority' might be precisely defined; it was, however, common ground, that there might well be cases in which such a disparity existed that it would not be appropriate to hold a representation vote. In our view, it would be unnecessary and premature for the Board to attempt, in this case, to define for the future what the minimum proportion of employees would be which a trade union must represent in order to be entitled to appear on the ballot in a representation vote in cases of this nature. It is sufficient for the Board, in the circumstances of the instant case, to say simply that it does not deem a representation vote to be appropriate...."

The foregoing approach was also applied by the Board in *The Corporation of the City of Mississauga*, [1974] OLRB Rep. March 184, in which the Board declined to direct a representation vote and declared the intervener trade union (which had represented 89.7% of the employees in the new bargaining unit) to be the bargaining agent. A vote was also refused in *The Regional Municipality of Halton*, [1978] OLRB Rep. Aug. 750, in which the Board stated, at paragraph 8:

“...In this matter there is no difficulty concerning an appropriate bargaining unit and the transferred employees represent only slightly over 8 per cent of the employees in the unit. There is, therefore, no difficulty in ascertaining the relative support enjoyed by the bargaining agents. It would therefore seem to be unnecessarily disruptive to labour relations between the respondent and its employees to order a vote under these circumstances.”

27. The Board had not specifically defined the minimum proportion of employees in the intermingled bargaining unit which a trade union must have represented prior to the intermingling for a representation vote to be appropriate. However, specific cases in which the Board has directed or refused a representation vote as a result of the degree of representation enjoyed by each of the competing trade unions provide some guidance as to the applicable parameters. In *Alcan Building Products*, [1968] OLRB Rep. May 212, an employer closed its window division and terminated all of the employees in that division. The employer's siding division took over the premises and rehired sixteen of the former window division employees who, together with the siding Division's work force of twenty-seven employees, became part of a total work force of forty-three employees. The Board found that a sale of a business and an intermingling of the employees of the two businesses had occurred. On the basis of respective representation of 37 per cent and 63 per cent of the employees by the competing unions, the Board directed that a representation vote be held. In the *Borden* case, [1970] OLRB Rep. Jan. 1244, the Borden Company Limited sold the Brantford area home delivery routes portion of its business to Silverwood Dairies Limited. The Board ordered a representation vote when the purchaser intermingled the ten employees formerly employed by the vendor with the purchaser's twenty-six employees at Brantford. Thus, representation of approximately 28 per cent of the employees in the new bargaining unit was held to be sufficient to justify a representation vote. In *Bryand Press Limited*, [1972] OLRB Rep. Apr. 301, a vote was ordered where the trade union represented only about one-third of the intermingled employees, the remaining two-thirds having not been represented by any trade union. Similarly, where “roughly one-third” of the employees in the new bargaining unit were represented by the applicant trade union, the Board found it to be “a proper case to conduct a representation vote” in the *Canadian Trailmobile* case, *supra*.

28. In *Mountain View Dairy Limited* case, *supra*, at paragraph 9, the Board declined to direct a representation vote where the applicant trade union represented only eight of the approximately sixty employees in the new bargaining unit, and declared the respondent trade union, which represented the remaining employees, to be the bargaining agent for the employees in the intermingled bargaining unit. Moreover, the Board suggested in that case that it would have disposed of the case in the same manner even if the respondent trade union had represented only seventy-five per cent of the employees in the new bargaining unit and the applicant trade union had represented twenty-five per cent. However, in *Middlesex-London*

District Health Unit, [1971] OLRB Rep. Sept. 560, a vote was ordered despite the fact that the applicant trade union represented only about twenty-five per cent of the employees in the new bargaining unit. Similarly, in *The Regional Municipality of Waterloo and the Corporation of the City of Cambridge*, [1973] OLRB Rep. June 302, the Board directed that a representation vote be taken where one of the two competing trade unions represented twenty-four of the thirty-three employees and the other trade union represented only the remaining twenty-seven per cent of the employees.

29. In the instant case, Local 647 formerly represented five of the twenty-one employees in the integrated operation. However, an unspecified number of the sixteen other employees are apparently part-time employees (excluded from Bargaining Unit #1 as set forth above). Although in view of the foregoing Board jurisprudence this is a borderline case, having regard to all of the circumstances of the case and the submissions of the parties, the Board in the exercise of its discretion under section 55(8) directs that a representation vote be taken of the employees of the respondent in Bargaining Unit #1. All employees of the respondent in Bargaining Unit #1 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote. Voters will be asked whether they wish to be represented by the applicant or by intervener #2 in their employment relations with the respondent.

30. This matter is referred to the Registrar.

1835-79-R Hotel and Club Employees' Union, Local 299 Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.I.O.-C.L.C.), Applicant, v. Sutton Place Hotel and Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, Respondents

Bargaining Unit – Certification – Employer – Determination of actual employer – Relevant criteria considered – Weight assigned to different criteria varying – Emphasis placed on determining person exercising fundamental control over employees – Several locations in Metropolitan Toronto – Single location unit appropriate

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members B. L. Armstrong and J. D. Bell.

APPEARANCES: Alick Ryder, Q.C. for the applicant; S. C. Bernardo and Wm. Blum for the respondents.

DECISION OF THE BOARD; October 1, 1980

I

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. The union has applied to represent the full-time maintenance department employees below the rank of chief engineer who work at Sutton Place at 955 Bay Street, Toronto. The applicant contends that these people are employed by Sutton Place Hotel. The respondent, on the other hand, argues that Dennis Management Company is their employer. Pursuant to this dispute, the Board appointed a Labour Relations Officer to inquire into and report to the Board on, among other matters, the facts relevant to determining the identity of the employer. The Board then heard argument on the Officer's report from counsel representing the parties. Sutton Place Hotel chose not to participate at this stage of the proceedings. Following the hearing and in an effort to further clarify the ownership and operation of the various parts of the Sutton Place complex, the Board, through the Labour Relations Officer, directed some additional questions to the parties. The respondent, Dennis Management Company, submitted answers which were undisputed by the applicant.

4. Dennis Management Company is an operating division of Affiliated Realty Corporation Limited. It is not therefore a corporation or a separate legal entity but rather a division of Affiliated Realty Corporation Limited.

5. Mr. W. Blum, the treasurer of the Dennis Group of companies, testified that it was "decided at the outset that Dennis Management Company, that is the owners, would act as the general contractor" for the construction of the Sutton Place complex which occurred between 1965 and 1967. The complex is made up of three sections: the commercial or office area which is the two floor podium, the apartments which occupy floors 18 through 32 of the main tower and the hotel which extends from floor 1 to 17.

6. Mr. Blum testified that "Sutton Place Hotel" is a registered style name. It is not a separate operating division. Sutton Place Hotel is a joint venture of York Steel Construction Limited and Affiliated Realty Corporation Limited of which Dennis Management is an operating division. Each company has an undivided half interest in Sutton Place Hotel. Mr. Rod Miller, the Corporate Controller for Sutton Place/Bristol Place Hotels described the arrangement between Affiliated Realty Corporation Limited and York Steel Construction Limited as a partnership. The corporate entity, Sutton Place Hotels Limited, is merely a corporate shell. It was intended to be the vehicle for the expansion of the Hotel but such an expansion has never materialized. Sutton Place Hotel, therefore, like Dennis Management Company is not a corporation or a separate legal entity but rather a division of York Steel Construction Limited and Affiliated Realty Corporation Limited which would appear from the evidence to be a partnership.

7. Dennis Management Company gave evidence that there is no single corporate or business entity operating all three divisions of the Sutton Place complex. Mr. Blum testified that from the inception of the Sutton Place complex, it was intended that the Hotel should be separate and distinct from the apartment and commercial sections. It was decided that the Hotel should be operated by people expert in running hotels and that the apartment and commercial complex should be operated by Dennis Management Company.

8. "Sutton Place" was registered as a business in 1970 to operate the apartment and commercial sections. The evidence before the Board does not reveal who registered "Sutton

Place” or who owns the business. The evidence does indicate, however, that it is Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, that operates the business of “Sutton Place”.

9. Dennis Management Company provided evidence that there is a separate corporate entity “Sutton Place Limited” which is the registered owner of a .002 per cent interest in the Sutton Place lands which it holds in trust for York Steel and Affiliated Realty. Bolivar Investments Limited is the registered and beneficial owner of 99.998 per cent of the lands of Sutton Place. Sutton Place Limited and Bolivar Investments Limited are tenants in common.

10. At the time of the construction of the Sutton Place complex, Dennis Management Company, as general contractor, applied to the Department of National Revenue for permit numbers. They received one with the prefix “S.P.A.” (Sutton Place Apartments). Through the period of construction, Dennis Management Company remitted tax withholdings under the S.P.A. number for persons employed directly by them at the Sutton Place complex. According to Mr. Blum’s evidence, in other words, from the time of the construction of the building and to the present day, employees of Dennis Management Company working at the Sutton Place complex have been dealt with for tax and other official purposes under the prefix, “S.P.A.”. When the Sutton Place Hotel was ultimately opened, Dennis Management Company received a second number with the prefix, “S.P.H.” (Sutton Place Hotel) which is currently used for the Hotel employees.

11. Mr. Jim Strachan is employed by Dennis Management Company as its buildings manager. His immediate supervisor is Mr. David Dennis. Strachan supervises the superintendents or chief engineers at the building locations where Dennis Management Company is responsible for the maintenance and engineering work. One of these buildings is Sutton Place. In total Dennis Management Company is responsible for the maintenance of approximately 30 buildings in Metropolitan Toronto many of which are within a two mile radius in downtown Toronto. The respondent submits that if Dennis Management Company is found to be the employer the appropriate bargaining unit for the maintenance employees involved in this application would include all of its maintenance employees in Metropolitan Toronto. The applicant argues, on the other hand, that no matter who is determined to be the employer, the maintenance employees at Sutton Place form an appropriate bargaining unit.

12. Dennis Management Company has a maintenance office at the Sutton Place location. It is situated on floor B1 below the main floor and is occupied by both the chief engineer who supervises the maintenance employees at the Sutton Place complex and his secretary. It is agreed by the parties that both the chief engineer and his secretary, like Strachan, are employees of Dennis Management Company.

13. Mr. Rod Miller, the Corporate Controller for Sutton Place Hotel is employed by Dennis Management Company and is responsible for operational accounting. He stated that Sutton Place Hotel has little involvement with the maintenance employees. It does not hire them, set their wages or establish their fringe benefits. Any complaints received by the Hotel management from Hotel guests relating, for example, to the behaviour of maintenance employees are referred by the Hotel to Dennis Management Company. Discipline, therefore, would be imposed by Dennis Management Company and not by Sutton Place Hotel. Additionally, Miller stated that the employees’ hours of work are recorded at Sutton Place and then sent to Dennis Management Company for calculation. All of the personnel records for the maintenance employees are kept at the Dennis Management Company offices and not

at Sutton Place Hotel. The personnel records of persons agreed by the parties to be Sutton Place Hotel employees, on the other hand, are kept at the Hotel.

14. It is clear on the evidence that the control over the employment relationship of the maintenance employees at the Sutton Place complex falls within the hands of persons employed by Dennis Management Company. The chief engineer, a Dennis Management Company employee, is the immediate supervisor of the maintenance employees. He hires them, disciplines them, grants casual time off, schedules their vacations and makes recommendations with respect to their wage increases. The responsibility for establishing their wage rates is that of the chief engineer's supervisor, Mr. Strachan, also agreed by the parties to be employed by Dennis Management Company. As well, the fringe benefits given to the maintenance employees are determined by Strachan's office. During a three week hiatus caused by a change over of chief engineers at Sutton Place, the employees were supervised by Mr. G. Moffat, the Sutton Place Hotel manager. The Board concludes on the evidence, however, that his supervisory responsibilities during this time were merely of a temporary nature and do not support the conclusion that ultimate control over the employees rests with the Hotel as opposed to Dennis Management Company.

15. Notwithstanding the high degree of control and supervision exercised by persons employed by Dennis Management Company, the two maintenance employees who testified stated that they thought that their employer was the Sutton Place Hotel. Mr. Gordon Garland was employed at the Sutton Place location as a painter from September 4, 1979 to January 8, 1980 when he was laid off for lack of work. Prior to working at the Sutton Place Hotel, he was employed at the Thomson Building in Toronto as a painter. It is agreed by the parties that at that location he was an employee of Dennis Management Company. As a result of a wage dispute between himself and the superintendent of the Thomson Building, Garland was moved to the Sutton Place location. Initially, Garland was on loan from Dennis Commercial Properties, an entity presumably related to Dennis Management Company. The time card that he used when he first transferred to the Sutton Place location contained the initials "D.C.P." (Dennis Commercial Properties). During the first week of October, however, the chief engineer at Sutton Place asked him if instead of being on loan from Dennis Commercial Properties he would like to become a full-time staff painter for Sutton Place. Mr. Garland answered in the affirmative and the chief engineer indicated that he would "take care of it". Mr. Garland testified that thereafter the letters "D.C.P." were removed from his time card.

16. Differences in the documentation Garland received while he was at the Thomson Building where it is agreed he was employed by Dennis Management Company and his documentation while at Sutton Place caused him to believe that he was employed by the Sutton Place Hotel when he worked at that location. While at the Thomson Building his pay cheques were issued under the name, "Dennis Management Company, 2944 Yonge Street, Toronto". As well his pay stub contained the name "Dennis Management". His T4 slip reported the name and address of his employer as "Dennis Management Company, 2944 Yonge Street, Toronto M4N 2K3". Likewise, his record of employment stated that the name and address of his employer was "Dennis Management Co., 2944 Yonge Street, Toronto, Ontario". In Box 14 on the Record of Employment which requests the reason for the issuance of the Record of Employment the following notation was made: "Employee transferred to Sutton Place. Employer No. SPA 500399".

17. At Sutton Place Garland's documentation changed. Although the pay cheques were

still issued under the name "Dennis Management Company", the pay stubs themselves displayed "Sutton Place" in the bottom right hand corner. Furthermore, he testified that his pay cheques were regularly given to him in an envelope marked "The Sutton Place Hotel". The T4 slip designated the name of the employer as "Sutton Place" but not at 955 Bay Street which is the address of the Sutton Place complex but rather at 2944 Yonge Street which is the address of Dennis Management Company. The Record of Employment that was issued to Garland upon his termination from Sutton Place similarly designated the name of the employer as "Sutton Place, 2944 Yonge Street", again referring to the location of Dennis Management Company. The employer account number entered in Box 5 of the Record of Employment is "SPA 500399". On the heading of Garland's notice of termination from his employment at Sutton Place is the name, "The Sutton Place Hotel".

18. In summary, all of Garland's documentation while at the Thomson Building where it is agreed he was an employee of Dennis Management Company contained references to Dennis Management Company. On the other hand, all of his documentation while working at the Sutton Place complex referred to either "Sutton Place Hotel" or "Sutton Place". Only the pay cheques themselves exhibited a reference to Dennis Management Company. The union argues that the dramatic change in documentation which accompanied Garland's move from the Thomson Building to Sutton Place strongly suggests that Garland's employer also changed.

19. General working conditions further caused Garland to think that he was employed by the Sutton Place Hotel. His time card was kept in the same rack as those of the other employees working at Sutton Place who are agreed to be employees of the Sutton Place Hotel. In that rack the time cards of the maintenance employees were placed under the heading "Engineering Department". There was no reference to Dennis Management Company. As well, the maintenance employees regularly used the cafeteria and locker room generally reserved for Sutton Place Hotel employees. Mr. Garland testified that there was a notice on the wall of the cafeteria entitled "To all Employees of Sutton Place". The notice indicated that employees of Sutton Place were permitted to have meals in the cafeteria at cost. The fact that the maintenance employees were entitled to this privilege added to Garland's conviction that he was a Sutton Place Hotel employee. Garland testified that to the best of his knowledge employees of outside contractors were not allowed to eat at the cost price although they could use the facility. By way of example he noted that while he was entitled to free coffee like the Sutton Place Hotel employees, employees of outside contractors had to pay for their coffee.

20. Peter Omielczenko, the other maintenance employee to testify, also stated that he understood that his employer was the Sutton Place Hotel. He testified that when he went to Sutton Place for a job he went into the personnel office in the Hotel lobby and was told to see the chief engineer. He was interviewed by the chief engineer in the cafeteria used by Sutton Place Hotel employees. During the interview he completed an application form which he stated, and the Board accepts, designated Sutton Place Hotel as the employer. As well, the application asked specifically if he had been employed by the Sutton Place Hotel before. Further Omielczenko's uniform displayed the logo for the Sutton Place Hotel as do the other maintenance employees' uniforms.

21. Consistent with the perception of these employees that Sutton Place Hotel was their employer rather than Dennis Management Company was Mr. Strachan's evidence that there would have been no means by which the maintenance employees would have known that their

supervisor, the chief engineer, was in fact employed by Dennis Management Company rather than by the Sutton Place Hotel.

22. The work performed by the maintenance employees is not solely for the benefit of the Hotel. Rather their work continuously benefits all three sections of the Sutton Place complex. There are common plumbing, heating, air conditioning and water systems for the three sections of the Sutton Place complex. The evidence establishes that, in general, maintenance employees working on these systems perform work that affects all three areas rather than just the Sutton Place Hotel. Omielczenko testified, for example, that when he worked on equipment in the boiler room it would affect the cooling and heating systems in all three areas. Garland testified, on the other hand, that during his period of employment he painted only the Hotel and did no work in the apartments or office section.

23. Who bears the burden of remuneration for the maintenance employees? The wages are paid through cheques issued from a Dennis Management Company bank account. Trying to ascertain whether this payment was actually just a “flow through” of funds from some other entity, counsel for the union asked Mr. Blum which corporation takes the benefit for income tax purposes of the maintenance employees’ wages. The Board concludes from Blum’s reply that no single corporation does but that it is the corporations behind “Sutton Place Hotel” and “Sutton Place” that take the benefit of these wages. The benefit is taken on a proportionate basis depending on the amount of work performed by the employees which has benefited each section of the complex (generally 60 per cent is attributed to the Hotel and 40 per cent to the apartments and offices). Mr. Blum testified that the Sutton Place Hotel business and Sutton Place are ultimately charged by Dennis Management Company for the wages paid. He acknowledged that in this sense Dennis Management Company might be viewed as a conduit. He further testified that there is also a proportionate charge made to Sutton Place Hotel and Sutton Place for the services of Mr. Lenz and Mr. Strachan.

24. The following conclusions may be drawn from the vidence.

1. The maintenance employees, on reasonable grounds, perceive that they are employed by the Sutton Place Hotel. In reaching this conclusion we rely on, among other facts, the following evidence:
 - a) They are given no cause to believe that their supervisor is anybody other than a person employed by the Sutton Place Hotel;
 - b) Their general working conditions highlight their relationship with the Hotel, not Dennis Management Company. The designation on the employees’ uniforms, for example, Sutton Place Hotel logo; they use the time card rack otherwise used exclusively by Sutton Place Hotel employees, and they work exclusively at the Sutton Place location;
 - c) Their documentation, apart from their pay cheques, indicates on the face that their employer is either Sutton Place Hotel or, more generally, Sutton Place. Garland’s notice of termination, for example, was headed “Sutton Place Hotel” and Omiel-

czenko's employment application designated "Sutton Place Hotel" as the employer and asked if he had been employed by the Hotel before. Their pay stubs and records of employment identified their employer as "Sutton Place, 2944 Yonge Street". Though 2944 Yonge Street is the address of Dennis Management Company, there is no reason disclosed in the evidence to suggest that the employees would have had cause to relate that address to Dennis Management Company.

2. The day to day supervision of the employees is, with the exception of the three week hiatus, carried out by Dennis Management Company. As well, the control over the employment relationship itself is in the hands of Dennis Management Company rather than Sutton Place Hotel:
 - a) For example, on a day-to-day basis Dennis Management Company assigns the employees their work, calculates their hours, and grants them time off;
 - b) On a more fundamental plane, Dennis Management Company has complete responsibility for the hiring, disciplining and firing of the employees. It does not consult with the Hotel in this regard;
 - c) Further, the wages and fringe benefits are set by Dennis Management Company without consultation with the Hotel.
3. The maintenance employees perform work that benefits not only the Hotel but also the apartment and office sections of the Sutton Place complex. The mechanical systems they maintain are common to all three areas.
4. With respect to the burden of remuneration the evidence discloses a charge-back system typical of contracts for labour and management services. Dennis Management Company pays the employees their wages out of a Dennis Management Company bank account and then charges "Sutton Place Hotel" and "Sutton Place" for both the labour and management service. The business arrangements between Dennis Management Company, on the one hand, and "Sutton Place Hotel" and "Sutton Place", on the other, do not alter the fact that in the context of this case Dennis Management Company bears the burden of remuneration and is not acting as a mere paymaster for someone else.

II

25. Where several entities have an impact on a group of employees, it is sometimes difficult to determine which entity is the employer for the purposes of *The Labour Relations Act*. In some instances, a party will apply under section 1(4) of the Act for a declaration that two or more entities carry on associated or related activities or businesses under common

control or direction and that they constitute one employer for the purposes of the Act. When the Board determines that two or more such entities constitute one employer for the purposes of the Act, it is unnecessary to decide which between them is the employer of the employees in question. In this case, however, the applicant union did not request that the Board declare that any two or more of the entities involved in this situation constitute one employer for the purposes of the Act. Accordingly, the Board must determine which entity between the ones put forward by the parties, Sutton Place or Dennis Management Company, is the employer of the maintenance employees working at Sutton Place.

26. In *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, the Board isolated seven factors to assist it in determining which of two or more entities is the employer for the purposes of *The Labour Relations Act*. At page 648 the Board listed the seven criteria:

- (1) The party exercising direction and control over the employees performing the work. - See the *Municipality of Metropolitan Toronto* case, 61 CLLC ¶16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. Sept. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. May 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. June 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. July 753, 761.
- (2) The party bearing the burden of remuneration. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. Oct. 487, 488; the *Kel Truck Services Ltd.* case, 1972 CLLC ¶16,068; and the *Templet Services* case, [1974] OLRB Rep. Sept. 606, 608.
- (3) The party imposing discipline. - See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party which is perceived to be the employer by the employees. - See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. - See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

In *York Condominium* the Board did not attribute relative priorities to the various criteria but

rather considered how each in turn applied to the particular facts before it and came to a decision based on the preponderance of evidence.

27. The relevant issue in *York Condominium* was to identify the employer of the cleaning and maintenance employees in the condominium. The management contract for cleaning and maintenance at York Condominium was initially held by Greenwin Property Management Ltd. On or about April 1, 1977, however, Medhurst, Hogg & Associates Ltd. took over the function of managing agent. The question before the Board was which company, as between York Condominium and Medhurst, was the employer of these cleaning and maintenance employees. The Board determined that at the relevant time the burden of remuneration was borne by York. Further, York both hired and fired the employees. The Board was satisfied that Medhurst had no intention of creating the relationship of employer/employee with the maintenance employees at York and that it was not at that time perceived as being the employer. Accordingly, the Board concluded on the totality of the evidence that York Condominium, not Medhurst, was the employer.

28. When, as in *York Condominium*, one company answers to nearly all of the seven criteria, the decision as to the identity of the employer is relatively simple. On the other hand, when various entities share the responsibilities in question the decision becomes more difficult and the Board must evaluate which criteria, in a given set of circumstances, are most indicative of an employer/employee relationship.

29. In numerous cases considered by the Board, the seven named indicators have pointed in different directions. In *Templet Services*, [1974] OLRB Rep. Sept. 606, for example, two companies shared control over the employment relationship of the persons in question. Both had input into their day-to-day supervision and both could cause them to be removed from the job. The Board was called upon to determine whether the employees in question were employed by Manpower Business Services, the entity supplying their labour or by Templet Services, the entity using their labour to install metal library shelving. Manpower assigned the employees to Templet and set their rates of pay. While on the job, Templet directed the work of the persons in question, decided the number of hours they would work, set their starting times and verified their time sheets. Further, Templet could fire any of the employees who proved to be unsatisfactory. If discipline was required, on the other hand, the evidence established that it was Manpower, not Templet, that assumed responsibility. As well, if an employee was dissatisfied working for Templet, he could request re-assignment from Manpower. The employees received their pay from Manpower. Manpower made deductions for income tax, Canada pension and unemployment insurance. Templet received no record from Manpower of these deductions but was in turn invoiced by Manpower on the basis of the number of hours of work that had been provided to it by Manpower. The Board weighed all of these factors and concluded that Manpower, not Templet, was the employer. At page 608 the Board reasoned as follows:

While the immediated direction of these persons is undertaken by Mr. Hoppe [the project manager of the job under consideration and a principal of Templet], the overriding control of their work clearly resides in Manpower. In addition, there is no evidence before the Board of any intention between the respondent and the persons affected by this application to create the relationship of employer and employee. Manpower provides a service which the respondent has evidently found

some occasion to use. The fact that the persons affected by this application are in close physical proximity to the respondent does not obscure the underlying nature of the relationship between them and Manpower. It is to Manpower that they look for setting the rate for the job, payment of wages, assignment to jobs, overall control and to whom they, in reality render their services.

30. In *Ralston-Purina Canada Inc.*, [1979] OLRB Rep. June 552, the Board was faced with a similar question of deciding whether the supplier of labour or the user of labour was the employer. Based on the different tableau of facts in *Ralston*, the Board distinguished *Templet Services* and concluded that it was Ralston, the company using the employees' services than International Personnel, the company supplying them, that was in fact the employer.

31. In the *Ralston* case, International Personnel supplied employees to work for Ralston. Unlike the situation in *Templet*, however, these employees were selected from International Personnel by Ralston. Ralston therefore could be considered the entity responsible for their hiring. Additionally, Ralston supervised the employees and could terminate them. International Personnel provided and administered their benefit plans. Further, it paid the employees their wages. In contrast to the situation in *Templet*, however, rates of pay were not set by International Personnel but were, instead, the subject of negotiations between Ralston and International Personnel. While Ralston did not pay the employees directly, the Board concluded that the burden of remuneration ultimately rested with Ralston, not International Personnel. Although Ralston never believed that the persons supplied to it by International Personnel were its employees, the Board concluded that the overriding control of their work rested with Ralston and that Ralston rather than International Personnel was in fact the employer for the purposes of *The Labour Relations Act*. For a similar decision on similar facts see *Welland County Roman Catholic Separate School Board*, [1972] OLRB Rep. Oct. 884.

32. An even clearer split between the payment of wages, on the one hand, and control over the other aspects of the employment relationship, on the other, may be seen in *Province of Ontario Board of Internal Economy*, [1980] OLRB Rep. Jan. 88. In this case the applicant union sought certification with respect to a bargaining unit described as "all employees in all N.D.P. constituency offices in the Province of Ontario". The question arose as to whether the persons working in the N.D.P. constituency offices in Ontario were employed by the Board of Internal Economy or the individual Members of the Legislative Assembly for whom they directly provided their services. The Board of Internal Economy, an organ of the Legislative Assembly, allocated money from the Consolidated Revenue Fund to provide constituency offices for Members of the Legislature. These funds placed a maximum on the amount of expenditure the Member could spend on his constituency office from public revenue though he could supplement the funds from his own pocket. The allocation of the money and the establishment of a ceiling on the funds available was the sole involvement of the Board of Internal Economy in the employment relationship of the persons working in the constituency offices. The individual Members of the Legislature interviewed and hired each constituency office worker. The contract establishing the conditions of employment was signed by the employee and Member. The Member determined the number of employees in his office, their rates of pay and their hours of work. He directed their work, disciplined and evaluated them and exercised the function of dismissing persons found to be unsuitable. For the payment of wages the Member would direct the Board of Internal Economy to pay his employees. The

money would then be withdrawn from the Members' allotment and a cheque issued by the Board of Internal Economy. On this evidence the Board concluded that the Board of Internal Economy was little more than a paymaster. As it was the Member who in fact had control over every aspect of the employment relationship, apart from the payment of wages, the Board decided that the Members, not the Board of Internal Economy, were the employers for the purposes of collective bargaining.

33. In *Board of Internal Economy* the Board accorded minimal weight to the fact that the source of the employees' remuneration was the Legislative Assembly. This evaluation, however, does not suggest that the burden of remuneration as a general criteria is less important than the others. Rather it reflects the realization that a government authority cannot be placed in the role of employer every time it funds a program. At page 89 the Board stated that it was "... well settled that the funding and administration of wages pursuant to government programs do not of themselves cast a government body in the role of employer." (See also *Waterloo County Roman Catholic Separate School Board*, [1977] OLRB Rep. Dec.856, and a decision of the British Columbia Labour Relations Board, *Kelowna Centennial Museum Association*, [1977] 2 Can LRBR 285).

34. Depending upon the particular blend of facts, the Board has at times concluded that a company's day-to-day control over employees is insufficient to cause it to be identified as the employer. In *Tower Company (1961) Ltd.*, [1979] OLRB Rep. June 583, for example, the Board decided that despite considerable involvement in the employment relationship there under consideration, the federal government was not the employer. The Tower Company had a contract with the federal government's Department of Transport for the supply of certain maintenance services at an air traffic control training school in Cornwall, Ontario. The Department of Transport supervised the employees, kept a record of their hours and could cause an employee to be fired. The Tower Company, for its part, interviewed, hired and paid the employees. The Board concluded that the Tower Company, not the federal government, was the true employer on the grounds that the Tower Company hired the employees, paid them and was recognized by the contract between the Tower Company and the Department of Transport as the employer. The Board noted that while it was the Department of Transport that exercised day-to-day control and supervision over the employees, this was the only one factor among many which had to be taken into account in identifying the employer. (See also *Boeing of Canada Ltd.*, unreported decision dated October 18, 1978, file no. 0293-78-R.)

35. In a number of cases the Board has emphasized the interest of an employee in knowing the identity of his employer.

36. In *Sentry Department Stores Limited (operating under the name G.E.M. Stores (1965))*, [1968] OLRB Rep. Sept. 540 (hereinafter referred to as G.E.M.), for example, the employees' perception of their employer was given greater weight than a private agreement as to the identity of the employer made between G.E.M. and the concessionaires of the various departments within the stores. The lease between them stated that "all persons employed by the concessionaires and working at the concessionaires' department in the store would be recognized and agreed to be under the control of the concessionaire and considered employees of the concessionaires." While all persons employed on the premises were selected and hired by the concessionaires, the lease further provided that G.E.M. would have the right to require the concessionaire to dismiss any employee from employment for good cause and the right and authority to supervise all non-management personnel and make any arrangements deemed by

G.E.M. to be necessary for harmony between the employees of all various departments. The employees were paid directly by G.E.M. though expenses incurred with respect to the employees were charged back to the concessionaire by G.E.M. G.E.M. deducted and remitted their income tax. Payments to Canada Pension Plan were deducted by G.E.M. and on the relevant C.P.P. documents G.E.M. was named as the employer.

37. These private arrangements were not revealed to the employees who were, in fact, led to believe that G.E.M. was their employer. The employment application forms were in the name of G.E.M. Stores, not the concessionaires. The label on the employees' identification pins was "G.E.M. Stores". Notices of salary changes were given in the name of G.E.M. Stores. General working conditions were set out in one pamphlet entitled "G.E.M. Stores Personnel Policies" and another document entitled "G.E.M. Stores Employees' Rules and Regulations". Further, when an employee was hired within the department, he received a document entitled "Welcome to G.E.M. Stores" which stated, "Now that you are employed on the staff of G.E.M. Stores, we of the Executive Staff take pleasure of welcoming you to our family". At page 546 the Board made the following comment on this evidence:

"... the evidence clearly established that the respondent has taken great pains to conceal the true identity of the concessionaires and has endeavoured to create the impression among the public and employees alike that the respondent is the sole operator of all departments within the store and is the employer of the employees within the departments described below."

At page 547, the Board emphasized the importance of an employee clearly knowing the identity of the person, partnership or corporation with which he is entering into a contract of employment. The Board then concluded that G.E.M. was the employer:

"Whatever the private arrangements between the parties to the lease may be, it is abundantly clear on the evidence that at the time of hiring and during the course of employment [G.E.M.] is identified as the employer of employees with whom we are here concerned. [G.E.M.] not only determines the rules and regulations governing the employees but in addition holds itself out to the employees as the employer at the time the employees' wage are paid. The employment relationship between an employer and employee is a contractual relationship and the employee party to the contract should at all times be able to identify the employer with whom the contract is made. While it is admitted that at times one or more persons may actively participate in the normal employment relationship an employee should be entitled to determine the identity of his employer when all the facts available to him are assessed. In the instant case, none of the facts available to the employees with whom we are here concerned point to any person other than [G.E.M.] as the employees' employer. Even the department manager is identified by [G.E.M.] as "our shoe department manager". In this way, the employees are led to believe that the department manager is a member of [G.E.M.'s] management team.

In the circumstances set out above, the Board must find that [G.E.M.]

having held itself out as the only person with whom the employees enjoy an employment relationship cannot now deny such relationship. While the concessionaires may be considered to be the employer of the employees for accounting purposes and since this fact was never disclosed to the employees at the time they were hired, because the respondent has retained control over those matters which are the normal subject of collective bargaining, the Board finds that [G.E.M.] is the employer of the employees in the bargaining unit described below for the purposes of *The Labour Relations Act*."

38. Similarly, in *Alwell Forming Limited*, [1978] OLRB Rep. Aug. 709, the Board highlighted the consensual element in the employer/employee relationship and its concern that the employee not be misled as to the identity of his employer. The employees affected by the application for certification in *Alwell Forming* had no clear idea of the identity of the employer at the time they were hired. The Board noted that they were introduced to the name "Alwell Forming Limited" when they received their pay cheques and stated that in the absence of any explanation to the contrary, the employees were entitled to perceive and conclude that their employer was Alwell Forming Limited. In emphasizing the importance of an employee knowing the identity of the employer, the Board said at page 715, quoting initially from another case,

"'Before leaving this aspect of the case we wish to make it clear that the complexities of modern business organization, including new and efficient accounting practices and procedures, do not lessen the necessity of the contractual or consensual element in the employer-employee relationship as described in considerable detail in the *Loblaw Case*. More specifically, a simple book transaction by employer A whereby an employee is transferred to the work force of employer B, or a direction by a foreman of employer A to an employee to report for work on the project of employer B do not by themselves make the employee in question an employee of employer B for the purpose of *The Labour Relations Act*. Some of the evidence heard in this case leaves us with the distinct impression that, for example, in the case of transfers, the consensual element so necessary in the employer-employee relationship is overlooked or forgotten in the drive to centralize accounting procedures.'

Even in a case where the evidence supports an assertion that for costing purposes employees are paid by a cheque issued by one legal entity rather than another legal entity, employers should not lose sight of the fact that in our society an employee is free to dispose of his labour to whomsoever he chooses. The consensual element in an employment relationship ought not to be forgotten. An employee is entitled to know the identity of his employer at the outset of the relationship with an employer. The disclosure of the identity of an employer should not be left to mere chance and speculation upon receiving a first pay cheque. In brief, an employee should be the first, not one of the last, to know the identity of his employer." [emphasis added]

39. In *Alwell Forming*, as in *G.E.M.*, the employees were hired by an employee of one

company, the Matthews Group, but were found by the Board to be employees of another, Alwell Forming. In further similarity to *G.E.M.*, and as in *Ralston* and *Welland County*, the Board identified one entity as the employer notwithstanding the fact that the entity so identified had not intended to create an employment relationship. The Board also found in *Alwell Forming* that Alwell Forming bore the burden of remuneration and that in the circumstances, the employees were entitled to perceive and conclude that their employer was Alwell Forming. The Board, therefore, consistent with the perception of the employees, held that Alwell Forming was the employer for the purposes of the Act.

40. The perception of the employees as to the identity of their employer is not always conclusive of a Labour Board's ultimate designation of the employer. In *Seafarer's International Union of Canada and Kent Line Ltd.* (1972), 27 D.L.R. (3d) 105, for example, the Federal Court of Appeal dismissed an appeal by the union from a decision of The Canada Labour Board which had found that Kent Line Ltd. was not the employer of the employees on whose behalf the union had applied for certification. The appeal was based on the argument that the Board had wrongly declined to find Kent Line Ltd. the employer when the employees had every reason to think that Kent Line was their employer. At pp. 108-109 the Court summarized the argument as follows:

"The main point of the applicant's attack on this finding was that all ostensible or apparent activity with respect to employer-employee relations for all the vessels was carried out by Kent Line, that Kent Line, carried out the activities which characterize an employer and that to the employees and the world Kent Line was the employer and was therefore the employer within the meaning of the relevant provisions of the *Canada Labour Code*."

In upholding the decision of the Canada Labour Board the Court stated at p. 109 that the Board was not bound to have regard only to the appearances:

"... but even accepting that employees could and may have been under that impression [that Kent Line was their employer] it seems to me that to hold that this inference from apparent activity must as a matter of law govern the result is not well founded. It appears to me to mean that in this field the appearance of facts is to be preferred to the realities. . . . In the view I take of the matter whatever weight in the circumstances was to be attributed to the appearances was a matter for the Board, that the Board was not bound to have regard only for the appearances and to reject the realities and that the Board's finding was plainly one that was open to it on the material before it. I would therefore reject the applicant's contention."

The Court further rejected the argument that Kent Line was estopped from denying that it was the employer on the ground that the manner in which it conducted its business constituted a representation to the employees that it was the employer. In his concurring opinion at pp. 114-115 Kerr J. said,

"It seems to me that the estoppel rule should not be applied where the effect of its application might be to cause the Board to find that Kent Line Ltd. was the employer if in fact it was not the employer and evidence was

available and tendered to prove that such was the case, for an application of the estoppel rule leading to that result would go a long way to prevent the accomplishment of the objectives of the collective bargaining provisions of the *Canada Labour Code*.”

Notwithstanding what was arguably the perception of the employees that Kent Line Ltd. was the employer, the Court upheld the Board's decision that it in fact was not. In supporting the Board's decision the Court emphasized that Kent Line did not hire the employees. This was done by the masters of the vessels who were not subject to direction by Kent Line to hire crew members approved by Kent Line. The Court further noted that the wages were not set by Kent Line, Kent Line had no authority to discharge the crewmen and the work of the crewmen was not directed by Kent Line. The facts of that case bear considerable similarity to the ones before the Board in the instant case.

41. A look at the jurisprudence highlights the wide variety of factual combinations that present themselves in cases where the Board is called upon to identify the employer. It is apparent on review that no one of the seven criteria set out in *York Condominium* is determinative in all cases. In *G.E.M.* and *Alwell Forming*, for example, the company which hired the employees was not found by the Board to be the employer. In *Ralston*, *Tower Company*, *Board of Internal Economy* and *Templet*, on the other hand, the entity responsible for hiring was found to be the employer. In *Ralston*, *Board of Internal Economy* and *G.E.M.* the entity supervising the employees on a day-to-day basis was found to be the employer while in the *Tower Company* and *Boeing of Canada* it was not. In *Templet* and *G.E.M.* the company paying the wages was found to be the employer. In the *Board of Internal Economy* it was not. In *Ralston* and for some employees in *Alwell Forming* the Board concluded that the company from whose account the wages were drawn was not the entity which actually bore the burden of remuneration. In *Ralston* and *Alwell Forming* the group which bore the burden of remuneration was identified as the employer, and in *Board of Internal Economy* it was not. In *G.E.M.* and *Alwell Forming* the Board's finding was consistent with the perception of the parties. In *Kent Line Ltd.* this would appear not to have been the case.

43. The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

44. A particularly important question answerable through an evaluation of all of the factors set out in *York Condominium* is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in *York Condominium* inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the

employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of *The Labour Relations Act*.

III

45. In the instant case the Board concludes on all of the evidence that Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, is the employer and not Sutton Place Hotel. It is Dennis Management Company which exercises fundamental control over the maintenance employees. Dennis Management Company has full control over the employees. Dennis Management Company has full control over the day-to-day supervision of the employees. It controls the very existence of the employment relationship itself through its function of hiring and discharging employees. As well, it has complete control over the important tasks of both establishing the rates of pay and paying the wages.

46. Although the wages are ultimately charged back to "Sutton Place Hotel" and "Sutton Place" and thus recorded as an expense by them, the Board, as set out in paragraph 23 above, is satisfied that Dennis Management Company is more than a mere paymaster. As between itself and the employees it bears the burden of remuneration. This situation is similar to that in *Templet* where the Board found Manpower to be the employer notwithstanding the fact that a charge-back for the wages was made to Templet Services. The case at hand is distinguishable from *Ralston* and *Board of Internal Economy* where the entity paying the wages was not found to be the employer. In *Ralston*, for example, both companies in question had input into establishing the wage rates which is not the case here. Further in both cases the entities which paid the wages were not the entities which exercised the fundamental control over the employment relationship as is the case here.

46. The notations of "Sutton Place" on the pay stubs, the identification of "Sutton Place, 2944 Yonge Street" as the employer on the T4 slips and records of employment and their employer number "S.P.A. 500399" shown on the records of employment would doubtlessly, and in our view unfortunately, be confusing to the employees. The Board concludes on all the evidence, however, that these notations are not inconsistent with the Board's conclusion that Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, is the employer. Mr. Blum testified that when "Sutton Place" is entered on a T4 slip by Sutton Place Hotel for its employees it refers to the Hotel complex but that when Dennis Management Company personnel put "Sutton Place" on the T4 slips of the maintenance employees it refers to the apartments. Further Mr. Blum testified that "S.P.A. 500399" is the employer number Dennis Management Company received from the government to make remittances for Dennis Management Company employees who were working at the Sutton Place location. Persons not in dispute and agreed by the parties to be employees of the Hotel are dealt with under the prefix "S.P.H." rather than "S.P.A.". The Board cannot conclude therefore that the use of the employer number "S.P.A. 500399" for the maintenance employees at Sutton Place supports the conclusion that they are employed by the Hotel. Rather it would suggest that they are not. As well, the address attached to the notation "Sutton Place" is Dennis Management Company's address and not that of the Sutton Place Hotel. Little can be said about the presence of "Sutton Place Hotel" rather than "Dennis Management Company" on the applications for employment and notices of termination except that they would naturally cause an employee to think his employer was the Sutton Place Hotel.

47. Notwithstanding the employees' reasonable and perhaps inevitable perception to the contrary, the Board must conclude that the Sutton Place Hotel in fact has no input into the fundamental aspects of the maintenance employees' employment. Where all other indicia of employer status point to a different entity as employer than that perceived by the employees to be the employer the weight to be given to that single factor must naturally diminish. The Board cannot ignore the realities of the situation and identify an entity as the employer solely because the employees think it is. The Board must look to the entire substance of the relationship. (See *Reid's Holdings (Belleville) Limited*, [1972] OLRB Rep. July 753 and *Welland County Roman Catholic Separate School Board*, *supra* as well as *Kent Line Ltd.*, *supra*.)

48. Unless there is a basis apart from employee perception for identifying a particular entity as the employer, there can be little merit from a labour relations point of view in so doing. If in this case, for example, the Board chose Sutton Place Hotel as the employer it would create a bargaining relationship between the union and an entity the Board has already found has no control over the areas of the employment relationship that are commonly the subject of collective bargaining such as wages, discipline, discharge, lay-off, hours of work and fringe benefits. By contrast, in *G.E.M.* the party the employees perceived to be their employer was also the entity possessing control over those matters which are the normal subject of collective bargaining. Further, naming the owners of "Sutton Place Hotel" as the employer would ignore the fact that approximately 40 per cent of their work is performed for the benefit of "Sutton Place" not Sutton Place Hotel".

49. For these reasons therefore the Board concludes that Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, is the employer. In light of this conclusion the Board would hope that Dennis Management Company, in its day-to-day affairs, will take steps to clarify for the employees its identity as their employer.

50. We turn then to the remaining issue, the determination of the appropriate bargaining unit. The respondent contends that the bargaining unit should include all of the buildings in downtown Toronto where Dennis Management Company employs maintenance employees. The applicant union, on the other hand, asks the Board to find that the employees working at Sutton Place Hotel is an appropriate unit.

51. The evidence reveals little if any interchange of employees between the various locations where Dennis Management Company has maintenance employees. The maintenance employees involved in this application only work at the Sutton Place location. They do not perform work at the other locations.

52. In addition to the absence of any significant interchange of employees between the various location, the evidence further reveals that Dennis Management Company, on an administrative basis, treats the employees at Sutton Place as an insular group. Dennis Management Company, for example, uses a different employer number for these employees than it uses for its employees at its other locations. Furthermore, the dramatic change in Garland's documentation which was effected by Dennis Management Company when Garland moved from the Thomson Building (one of the other locations the respondent contends should be included in the bargaining unit) to Sutton Place supports the conclusion that for administrative purposes Dennis Management Company treats the Sutton Place location as a separate unit. This separation is further highlighted by the fact that soon after Garland was moved from the Thomson Building to Sutton Place he was asked whether instead of being on the loan he would like to become a full-time painter for Sutton Place. In sum, the very strength of the em-

ployees' perception of Sutton Place Hotel as their employer supports the conclusion that the appropriate bargaining unit is the Sutton Place location.

53. In these circumstances the Board concludes that the maintenance employees at the Sutton Place location do not share a sufficient community of interest with Dennis Management Company's maintenance employees at the other locations in Metropolitan Toronto to be included in the same bargaining unit. The Board therefore finds that the geographic scope of the bargaining unit limited to the Sutton Place complex is appropriate. (See the Board's decisions in *York Steel Construction Limited* [1980] OLRB Rep. Feb. 293, *T.R.S. Food Services Limited* [1980] OLRB Rep. April 542, and *Midnorthern Appliance Industries Corp.*, [1980] OLRB Rep. April 484.)

54. Having regard to the agreement of the parties on all matters relating to the bargaining unit apart from the identity of the employer and the geographic scope of the bargaining unit, the Board finds that all employees of Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, employed in the maintenance department at The Sutton Place complex in Metropolitan Toronto save and except maintenance chief engineer, those above the rank of maintenance chief engineer, apartment superintendents, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and those covered by subsisting collective agreements, constitute a unit of employees appropriate for collective bargaining.

55. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, in the bargaining unit at the time the application was made, were members of the applicant on January 9, 1980, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

56. A certificate will issue to the applicant.

0976-80-R Local 58, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Applicant, v. **Toronto Arts Productions**, Respondent.

Employer – Determination of actual employer – Relevant criteria considered – Identification of employer exercising ultimate control (Decision inadvertently omitted from September report)

BEFORE: R. D. Howe, Vice-Chairman, and Board Members T. G. Armstrong and M. J. Fenwick.

APPEARANCES: *Thomas W. G. Pratt for the applicant; W. G. Phelps for the respondent.*

DECISION OF THE BOARD; September 19, 1980

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.
3. The applicant filed this application with the Board on August 8, 1980, by which it seeks to be certified as the bargaining agent for all stage carpenters, stage electricians and property men employed by the respondent in the Municipality of Metropolitan Toronto. The respondent's reply, dated August 19, 1980, included the following statement:

“Toronto Arts Productions employs no persons in the proposed bargaining unit. At the time of the application, certain persons were employed in premises by Toronto Arts Productions to Theatre Plus. Those persons were not employees of Toronto Arts Productions. Toronto Arts Productions, Theatre Plus and St. Lawrence Centre are separate entities to which Section 1(4) of the act does not apply.”
4. The evidence adduced at the hearing establishes that the respondent is non-profit organization which produces various forms of theatrical entertainment. It leases a shop at 65 Trinity Street, Toronto, under a ten year lease (with option to purchase) from Stan Price Warehousing. The shop is used to produce sets and “props” for plays staged at the St. Lawrence Centre and other locations. St. Lawrence Centre is a theatre owned by the City of Toronto. St. Lawrence Centre, which does not itself create theatrical productions, rents its facilities to theatre companies including Toronto Arts Productions and Theatre Plus. Theatre Plus is non-profit organization which produces shows in the Town Hall at the St. Lawrence Centre during the summer theatre season. It was common ground between the parties that the terms of collective agreement between St. Lawrence Centre and the applicant require that, subject to waiver by the applicant, only sets built by union members can be used at the St. Lawrence Centre.
5. The respondent called as a witness Mr. Zdzislaw Vajon. Mr. Vajon testified that he “basically” works as Production Director for Toronto Arts Productions, “which provides production services for St. Lawrence Centre” in return for a fee. Although he is not on the payroll of St. Lawrence Centre, his services are contracted out by Toronto Arts Productions to St. Lawrence Centre. Thus, he continues to be paid by Toronto Arts Productions while performing services for St. Lawrence Centre. On the date of the application, Mr. Vajon was

also the Production Manager for Theatre Plus. He received a separate contract from Theatre Plus to hold that position on an interim basis for the summer of 1980 because the person who normally serves as Theatre Plus Production Manager accepted an offer in April 1980 to commence immediate employment with another company in the United States. Thus, Mr. Vajon testified that on August 8, 1980, he was “wearing three hats.”

6. It was Mr. Vajon’s evidence that on August 8, 1980, the shop had been “leased” to Theatre Plus by Toronto Arts Productions for the building of a set for “The Night of the Iguana”, a play to be staged at the Town Hall by Theatre Plus. The “lease” was not produced as an exhibit before the Board. However, Mr. Vajon testified that Toronto Arts Productions makes a new agreement each summer theatre season (April to August) with Theatre Plus concerning the use of the shop. He also stated: “Toronto Arts Productions rents the shop to Theatre Plus. If someone else wants to rent it, Theatre Plus has to let us work them in.” Some of the materials used to build the set for The Night of the Iguana were sold to Theatre Plus by Toronto Arts Productions from its inventory of materials stored in the shop. Certain additional materials were ordered specifically for that set. All such additional materials were ordered and paid for by Theatre Plus.

7. Two members of the respondent union, James MacDougall and Roger Read, were working at the Toronto Arts Production shop on August 8, 1980. They were paid for this work by St. Lawrence Centre which charged the payment back to Theatre Plus. Mr. MacDougall testified that he has been employed at the Toronto Arts Productions shop as a Production Carpenter “since the shop opened over two years ago”. Throughout that period he has been paid by St. Lawrence Centre, regardless of whether the sets on which he was working were being built for use by Toronto Arts Productions at the St. Lawrence Centre or for use by other theatrical producers in other theatres. He further testified that he takes his direction at work from Mr. Vajon, John Woods (whose company John Woods and Company is employed by Toronto Arts Productions as Technical Director) or the designer of the particular show. It was his evidence that there was “no difference in the direction which [he] received concerning this set [for The Night of the Iguana] than any others.” Mr. MacDougall was of the opinion that he was employed by Toronto Arts Productions on August 8, 1980 and during the preceding two year period.

8. Mr. Vajon testified that he directed Mr. MacDougall and Mr. Read to build the set for The Night of the Iguana on August 8, 1980 in his capacity as Production Manager of Theatre Plus, but added that this position is “interchangeable” with his position as Production Director of Toronto Arts Productions. In cross examination he agreed that he did not “normally identify which hat [he] was wearing” unless an argument arose. There was no indication that any “argument” had arisen concerning The Night of the Iguana set. Moreover, as noted above, Mr. Vajon also stated in cross examination that he was “wearing three hats” on August 8, 1980. Mr. Vajon was of the view that on August 8, 1980, Mr. MacDougall and Mr. Read were working for St. Lawrence Centre and “also indirectly for Theatre Plus” because they were building a set for Theatre Plus, but that they were not working for Toronto Arts Productions at that time.

9. The evidence also establishes that employment in the theatrical production industry is generally transitory in nature. It is not unusual for employees to move from one employer to another, sometimes working for one employer during the morning of a particular day and for another employer during the afternoon, nor is it unusual for members of management such as production directors to frequently change employers.

10. It was common ground between the parties that the respondent, Theatre Plus, and St. Lawrence Centre are separate entities. Counsel for the applicant indicated to the Board that his client was not relying on section 1(4) of the Act since, in his submission, the evidence clearly indicated that the persons in question were employed by the respondent on August 8, 1980. He suggested that the payment of wages by St. Lawrence Centre to the employees in question was merely an administrative arrangement convenient to everyone concerned. In support of this contention, he noted that the employees were invariably paid by St. Lawrence Centre, whether they were working on sets for use by Toronto Arts Productions at the St. Lawrence Centre or on sets for use by other theatrical producers at other theatres.

11. Counsel for the respondent, on the other hand, contended that the employees in question were employed on the date of the application by either St. Lawrence Centre or Theatre Plus, but not by the respondent which was neither paying nor directing them on that day.

12. In most situations it is quite clear to all concerned parties which entity is the employer of the employees affected by the application for certification. However, the Board has, on occasion, dealt with cases involving arrangements under which this basic relationship is somewhat obscure. For example, in *Welland County Separate School Board*, [1972] OLRB Rep. Oct. 884, the Board was called upon to determine whether certain office and clerical staff were employees of the respondent or Office Overload. The Board stated, at paragraph 10.

“In the Reid’s Holdings (Belleville) Limited case, (Board File No. 1701-71-R dated June 22, 1971), the Board was faced with a problem of a similar nature to the present case. In that case, the Board in arriving at a conclusion as to which of two companies was the employer considered the following criteria:

- (1) With whom are negotiations carried on with respect to
 - (A) wages
 - (B) working conditions?
- (2) Who exercises disciplinary powers?
- (3) Who actually does the hiring?
- (4) Who controls the employees’ work methods?

• • •”

The Board concluded in that case that the persons in question, who had been employees of the respondent before the respondent entered into a contract with Office Overload for certain services, continued to be employees of the respondent even though they received their pay cheques from Office Overload because “... Office Overload took over only the mechanics of pay and the necessary statutory deductions ...”

13. The criteria which the Board considers helpful in determining which of two (or more) entities is the employer for the purposes of *The Labour Relations Act* have been expanded by subsequent decisions to include the following seven factors listed in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, at paragraph 10:

- “(1) The party exercising direction and control over the employees performing the work. – See the *Municipality of Metropolitan Toronto* case, 61 CLLC ¶16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. Sept. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. Mar. 224, 227-9; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. June 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. July 753, 761.
- (2) The party bearing the burden of remuneration. – See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. Oct. 487, 488; the *Beer Precast Concrete Limited* case, *supra*; the *Kel Truck Services Ltd.* case, 1972 CLLC ¶16,068; and the *Templet Services* case, [1974] OLRB Rep. Sept. 606, 608.
- (3) The party imposing the discipline, – See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The part hiring the employees. – See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. – See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party who is perceived to be the employer by the employees. – See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. – See the *Belcourt Construction (Ottawa) Limited* case, *supra*.”

14. The Board has consistently found that neither private agreements as to who is the employer nor administrative paymaster arrangements are indicative of the true employer. Moreover, the Board has attached considerable significance to “overriding control” rather than “immediate control” in determining which of two or more entities is the employer of certain persons (see, for example, *Templet Services*, [1974], OLRB Rep. Sept. 606, at paragraph 14).

15. The application of the foregoing criteria to the present case is somewhat problematic. As noted above, Mr. Vajon testified that he was exercising direction and control over the employees in question on August 8, 1980 in his capacity as Production Manager for Theatre Plus, but added that this position is “interchangeable” with his position as Production Director of Toronto Arts Productions. Normally, Toronto Arts Productions bears the ultimate burden of remuneration of those employees, but on August 8, 1980 that burden was being borne by Theatre Plus. There is no evidence concerning with which entity negotiations are carried on with respect to wages or working conditions nor concerning which entity

exercises disciplinary powers. It appears that the employees are hired through the applicant's hiring hall. Mr. Vajon was asked by counsel for the applicant: "When personnel are required for the production of sets at 65 Trinity Street, who orders them?" His response was: "The head of the department who is a member of [the applicant] will make the call under my direction." It appears from the evidence that Mr. MacDougall was hired by Toronto Arts Productions prior to 1978 at a time when the Company's shop was at another location in Toronto. No evidence was adduced concerning the particulars of the hiring of Mr. Read. There is also no evidence with respect to which entity has the power to dismiss these employees.

16. Mr. MacDougall perceives his employer to be Toronto Arts Productions. Under the circumstances, the Board finds this to be a reasonable perception having regard to the fact that he has worked under the direction and control of Mr. Vajon and Mr. Woods in the Toronto Arts Productions shop on Trinity Street continuously during the two year period since that shop opened. Prior to that, he performed the same job (i.e. production carpenter) for Toronto Arts Productions in a shop located elsewhere in Toronto. There is no evidence that Mr. MacDougall was ever told that Mr. Vajon was supervising him in any capacity other than that of Production Director of Toronto Arts Productions. The materials which he used to construct the set for *The Night of the Iguana* included materials from Toronto Arts Productions inventory and the directions which he received concerning that set were no different than the directions which he received concerning other sets which he had dealt with previously. He continued to be paid by St. Lawrence Centre in the same fashion as he had been paid since he originally commenced employment with Toronto Arts Productions.

17. There is no evidence of the existence of an intention to create the relationship of employer and employee between Theatre Plus and Mr. MacDougall (or Mr. Read). Although there is a dearth of evidence concerning the precise contractual arrangements between Theatre Plus and Toronto Arts Productions, it is a reasonable inference from the evidence taken as a whole that the latter agreed to provide the former with the benefit of the use of its premises, its inventory of materials, and its experienced workforce for a fee. On this view of the facts, the charge back of wages by St. Lawrence Centre to Theatre Plus rather than to Toronto Arts Productions would merely be a convenient administrative arrangement for dealing with one item of expense for the services provided to Theatre Plus by Toronto Arts Productions.

18. Although immediate control over the employees in question may have been exercised by Theatre Plus on the date of the application, ultimate control of the employees resided in Toronto Arts Productions which through its Production Director had the power at all material times to direct the employees in question to cease working on the Theatre Plus set for *The Night of the Iguana* and commence working of some other set or "prop" for Toronto Arts Productions, as evidenced by the aforementioned "lease" arrangements between Toronto Arts Productions and Theatre Plus, and by the fact that Mr. Vajon's position as Production Manager of Theatre Plus was "interchangeable" with his position as Production Director of Toronto Arts Productions. Moreover, it is with Toronto Arts Productions rather than with Theatre Plus that Mr. MacDougall (and presumably also Mr. Read) has a continuing relationship.

19. Having regard to all the evidence before it and the submissions of the parties, the Board finds that the persons in question were employed by the respondent on the date of the application.

20. The parties requested the Board to issue a decision determining whether Toronto Arts Productions was the employer of the persons in question, prior to dealing with the other

relevant issues such as the scope of the appropriate bargaining unit, as they were of the view that they would probably be able to reach agreement concerning those other issues once the former issue had been determined. The Board has acceded to that request.

21. This matter is referred to the Registrar to be scheduled for continuation of hearing, if necessary, in consultation with the parties.

2193-79-U Reginald Walker, Complainant, v. Local No. 1, Canadian Union of Public Employees, Respondent, v. Toronto Hydro Electric System, Intervener.

Duty of Fair Representation – Union executive threatening employer with strike unless employee removed from particular overtime assignment – Whether grievance against employer appropriate – Board directing Union to pay damages, post notices and cease and desist further unlawful conduct

BEFORE: M. G. Picher, Vice-Chairman.

APPEARANCES: *E. Rovet for the complainant; C. M. Mitchell, B. Oldham and E. Tucker for the respondent; Wallace M. Kenny and Bryan Hughes for the intervener.*

DECISION OF THE BOARD; October 21, 1980

1. This is a complaint filed under section 79 of *The Labour Relations Act*. The complaint alleges that the respondent (hereinafter referred to as CUPE, Local No. 1) breached its duty of fair representation pursuant to section 60 of the Act by its treatment of the grievor.

2. The grievor, Reginald Walker, has been an employee of the Toronto Hydro Electric System for 32 years. For the last 21 years he has worked as a foreman on a cable crew. For the purposes of this complaint all parties are agreed that Mr. Walker is an employee both within the meaning of the Act and within the meaning of the collective agreement between CUPE Local No. 1 and the employer. Mr. Walker has been a member of CUPE Local No. 1 since it was established in the sixties, as well as of its predecessor union.

3. Part of Mr. Walker's responsibilities involved supervising a classification of employees known as jointers during overtime work. Mr. Walker is a competent and hard-working employee. He is also firm and not popular in his approach to employees under his supervision.

4. On a weekend in late September, 1979, Mr. Walker was working the standby overtime shift. In the course of the shift he failed to call in a jointer named Lee to do overtime work. Lee grieved, claiming that he was entitled to be called in under the collective agreement. The Lee incident sparked a stormy reaction among the jointers, who communicated their displeasure to the executive of the union.

5. The executive of the union are predominantly jointers. Three of the four table officers of the executive board are jointers, including, Bernard Oldham, the president, who is a full-time executive officer on leave from his work duties, the vice-president, Eric Symes and the treasurer, Harold McLeod.

6. After the incident involving Lee, Mr. Oldham was advised by several of his fellow employees that jointers were threatening to walk off the job if something wasn't done about Walker. Mr. Oldham then called a meeting of the jointer's section of the union for the evening of October 4, 1979. The meeting was held in the O.F.L. building, at 15 Gervais Drive, Don Mills, where the union's offices are located. Twenty-eight of the approximately thirty-five jointers in the bargaining unit attended. The clear purpose of the meeting was to put a stop to the irritant that Mr. Walker had become. The complainant, Mr. Walker, was not given notice of the meeting and did not attend.

7. Mr. Oldham chaired the union meeting and drafted a petition which was circulated and signed by all of the jointers present, including the president and the treasurer of the union. Four more jointers, including the union's vice-president, Mr. Symes, also signed the petition several days later. The petition was addressed to Mr. R. M. Bishop, Assistant General Manager of the Toronto Hydro-Electric Commission. It demanded that Mr. Walker be removed at once as a foreman and advised the employer that the jointers would not work with Mr. Walker during regular working hours or during overtime. Lastly, it threatened the withholding of overtime work on the Francko Lambert Project, an important job which the employer was committed to completing within a fixed time schedule and for which overtime was vital. The petition alleged that part of the jointers' concern was that Walker had insufficient regard for safety. The evidence, however, establishes no recent complaints about the safety of Mr. Walker's work practices. The Board finds that safety is not what motivated the employees or the union. The petition was a specific reaction to the failure to call in Mr. Lee the previous week, a culminating incident in a backlog of displeasure with Mr. Walker's style of dealing with employees.

8. On October 12, 1979, Mr. Oldham and three other jointers, including Mr. Lee, presented the petition to Mr. Bishop and to Mr. Bryan Hughes, the Personal Manager of the employer. Principally because of the threat of an unlawful work stoppage at a vital job site, the employer felt it had no alternative but to concede. Later that day management informed Mr. Walker that he would not supervise the work of jointers and would therefore not be given any standby overtime work. From that time to the present Mr. Walker has been deprived of overtime, at a considerable financial loss to himself. He has not been demoted. The grievor alleges that by taking the initiative against him and effectively causing the loss of part of his employment the union breached the duty of representation that it owes him under section 60 of the Act.

9. Neither the employer nor the union ever gave a copy of the petition to the grievor. The union submits that it should not be found to have breached section 60 of the Act because Mr. Walker made no attempt to file a grievance through the union. Mr. Walker testified, and the Board accepts, that although he did have some discussions with his shop steward, Mr. Dan McLellan, he decided that there was no point to attempt to grieve through the union the sanctions imposed on him by his employer. He saw that as a futile exercise. He saw the petition as the work of Mr. Oldham, the union's president and knew that it was supported by Mr. Symes, the vice-president of CUPE Local No. 1 as well as by Mr. McLeod, its treasurer.

Given the circumstances he did not expect any grievance he might file to be successful at the first two stages of the grievance procedure, where it would be handled by his shop steward. At step 3 his grievance would be handled by the grievance committee which is comprised of the grievor's steward, the Chief Steward, Eric Symes, who signed the petition and Mr. Oldham, the union's president who drafted, signed and carried the petition to the employer. It is at that level that a recommendation is made whether to go to arbitration. The grievor saw no point in putting himself in the position of asking his accusers to be his defenders. He therefore did not ask his steward to process a grievance for him, choosing instead to file the instant complaint.

10. In our view, in the extraordinary circumstances of this case it was not unreasonable of Mr. Walker to decline to pursue the union's grievance procedures as an avenue of redress. Although Mr. Oldham testified that he and Mr. Symes would have disqualified themselves from participating at Stage 3 of the grievance procedure, he gave Mr. Walker good reason to think otherwise. On November 19, 1979, Mr. Walker appeared before a meeting of the executive board of the union to request a copy of the petition against him. The committee gave him no response at that time, telling him that it would get back to him on his request. It later informed him that it did not have a copy of the petition. On that occasion Mr. Oldham made no attempt to disqualify himself either from the meeting or from the private deliberations of the committee afterwards. The complainant had little hope that he would be treated fairly in respect of his grievance in any proceeding of the union, including a meeting of the general membership. A general meeting of the union would be conducted by the executive, three of whose members had placed themselves in a conflict of interest and would, moreover, be chaired by Mr. Oldham, who to all appearances led the attack against him and showed no willingness to assume a neutral role or to withdraw from the fray.

11. Section 60 of the Act provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

12. The foregoing section imposes a statutory duty of representation that is owed to all employees, regardless of their personal characteristics or their popularity among their fellow employees. Under section 60 the executive of the union owes a duty of fair representation to Mr. Walker no less than to the jointers, no matter how legitimate the grounds for their complaint. In the instant case the grievor has been deprived of substantial income by the actions of his employer. The employer's decision was prompted entirely by employee feeling which Mr. Oldham and other members of the union executive allowed to be channelled into an organized union initiative.

13. Heated conflict can flare up within a union, as within any organization. Internal disputes may place executive officers in a delicate situation where they have to choose between the competing interests of groups or individuals within the union. The fact that they or the general membership may come down on the side of an issue in a way that adversely affects the interests of certain members does not violate section 60 of the Act, provided that they do so in a way that is not arbitrary discriminatory or in bad faith. That is the minimum standard to

which they must adhere. (See *Ford Motor Company of Canada Ltd.*, [1973] Rep. Oct. 519).

14. In a recent Board case, *Toronto East General and Orthopaedic Hospital Inc.*, [1980] OLRB Rep. Apr. 555, an employee was discharged following an employee petition sponsored by his shop steward and the president of his union local threatening an unlawful strike if he were not removed. In reviewing the conduct of the union officials in that case, at p. 563 the Board stated:

There may well be situations in which a union official is justified in requesting that management remove an employee from the workplace. One example that comes to mind is that of an employee who consistently engages in unsafe conduct which poses a direct threat to the wellbeing of other bargaining unit employees. Even where a union official is concerned with the continued presence of an employee in the workplace, however, he must bear in mind that he still owes a duty of fair representation to that particular employee. The union official owes it to the employee to address himself to the merits of any allegations raised against the employee and not demand his removal simply on the basis of rumour or unfounded suspicions. In the instant case [the shop steward and the union president] engaged in conduct specifically designed to achieve the complainant's discharge. Their actions appear not to have been preceded by any investigation of the facts...and at no time did they give the complainant a reasonable opportunity to respond to the allegations against him. On the evidence led at the hearing, the Board is drawn to the irresistible conclusion that neither of [the union officers] even addressed himself to the merits of the allegations against the complainant. In other words, they demanded his discharge solely on the basis of false rumours and unfounded suspicions which they never bothered to investigate or seek to verify. Such a cavalier and insensitive approach to something as important to the complainant as his continued employment can only be described as shocking. The Board has no hesitation whatsoever in concluding that the conduct of [the union officers] and through them [the union], indicated such a non-caring attitude towards the complainant as to amount to arbitrary conduct in violation of the union's duty to the complainant under section 60 of the Act.

15. In that decision the Board expressly rejected the contention that the union officials involved had to participate in the employees' protest in order to maintain credibility with the membership. It commented at p. 564:

Union officials cannot justify their demand for the discharge of an employee on the basis of a need 'to go along with the crowd' when the crowd itself is acting on the basis of rumours and unsupported suspicions. One of the very purposes of section 60 is to protect individual employees from majority employee conduct when the majority is acting in an arbitrary manner.

16. The reaction of the jointers section of the union against Mr. Walker was clearly sparked by what they perceived as an injustice to Mr. Lee. *The Labour Relations Act* provides

for the resolution of complaints such as Mr. Lee's by grievance arbitration. It expressly prohibits resort to strikes or the threat of work stoppages to redress grievances during the life of a collective agreement. For union officers to join, much less lead, an employee action of that kind aimed at one of their own members is to resort to obviously arbitrary measures. In the instant case the union officials who joined in the petition and threatened to strike to have Mr. Walker demoted and deprived of overtime were arbitrary in their treatment of the grievor. They were also arbitrary in that they made no attempt to learn from him what his side of the story might be or to give him notice of a union meeting that effectively tried him *in absentia*. By their conduct the union's officers compromised themselves and the union's ability to credibly process any grievance that the grievor might wish to bring as a result of their actions. On the evidence before it, the Board must conclude that the union breached its duty towards the grievor by the arbitrary conduct of its executive officers and of the jointers' section towards the grievor. The union also discriminated against the grievor by effectively excluding him from the union meeting concerning his rights as well as from the meeting with management, and acted in bad faith, contrary to its duty under section 60 of the Act, by concealing from him those events and the content of the petition against him.

17. The Board views the union's conduct in this complaint as reprehensible to a degree that necessitates an unequivocal remedial order. The Board's order in any complaint must respond to the special circumstances of the case. This is not, as is common in section 60 complaints, a grievance first arising out of an imputed breach of the collective agreement by the employer followed by a refusal of the union to process the grievance to arbitration. In cases of that kind the Board is reluctant to assess the merits of an employer's conduct in the course of framing a remedial order under section 60 of the Act. The Board generally will not, therefore, dispose of a dispute between employer and employee that is essentially a matter for arbitration. Rather, where the breach of section 60 is grounded in a union's refusal to advance a grievance to arbitration the Board will make an order, with or without procedural conditions, requiring it to do so. (For a review of the Board's rationale for this approach see *Massey-Ferguson Industries Limited*, [1977] OLRB Rep. Apr. 216).

18. This is not that kind of complaint. In this case the grievor's rights were initially violated by the union. The grievor's economic loss arose only when the employer acceded to the union's demands. While there were obvious economic reasons for the employer's capitulation, it was the employer's response in the end that allowed the union's conduct to work its result.

19. An employer can, in a number of ways, become a participant in a breach of an employee's rights under section 60 of the Act. It can become involved by collusion or, as in this case, by becoming the instrumentality by which the unlawful end is achieved. When an employer's actions are an integral part of the conduct that is being complained of under section 60 any order that redresses the breach of the union's duty of representation by returning the parties to the *status quo* that preceded the breach may, of necessity, affect the employer.

20. The Board is not unmindful of the practical difficulties which faced the employer in the circumstances of this case. While the Board does not endorse the action which it took, it gives some weight to the fact that the employer was more a reluctant victim than a willing partner in the action aimed at Mr. Walker. Consequently the Board's order is fashioned to cause the minimum disruption to the employer, assigning, insofar as possible, the greater

remedial burden to the union. Moreover nothing in this order should be construed as limiting the future ability of the employer to take such lawful steps as it would ordinarily be entitled to take in respect of Mr. Walker or any other employee.

21. The Board therefore orders:

- 1) That Mr. Walker be reinstated by the employer forthwith to standby duty on the same basis as prior to the employer's directive of October 12, 1979.
- 2) That the respondent union compensate the complainant for all economic loss suffered by the complainant from the date of his removal from the standby list to the date of his reinstatement. Such compensation shall, however, be reduced because of the delay of the complainant. It would in our view have been reasonable for the grievor to file this complaint within approximately one month of the date when it arose. In this case that would be November 12, 1979, one month after the day the employer acted in response to the union's petition. He did not file this complaint until February 25, 1980. The union shall, therefore, not be required to pay any compensation attributable to the grievor's delay between November 12, 1979 and February 25, 1980.
- 3) The Board orders that the union and its officers cease and desist from any arbitrary, discriminatory or bad faith conduct in the representation of Mr. Walker.
- 4) The respondent union is directed to provide copies of the attached notice marked "Appendix", signed by the respondent's president, forthwith to the intervener employer in sufficient numbers for posting on the employer's premises.
- 5) The intervener is directed to post forthwith copies of the attached notice marked "Appendix", duly signed by the respondent's president, in conspicuous places at its places of business or work centres where bargaining unit employees are based in Toronto, including all places where notices to employees are customarily posted, and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the intervener to insure that the said notices are not altered, defaced or covered by any other material.

22. The Board remains seized of this complaint to resolve any matter arising out of the interpretation of its order.

The Labour Relations Act

1567

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE, LOCAL NO. 1, CANADIAN UNION OF PUBLIC EMPLOYEES, HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM ALL EMPLOYEES IN THE BARGAINING UNIT OF THEIR RIGHTS.

THE ACT GIVES INDIVIDUAL EMPLOYEES THESE RIGHTS:

TO BE REPRESENTED BY A TRADE UNION AND
TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

TO BE REPRESENTED BY A TRADE UNION IN A
WAY THAT IS NOT ARBITRARY, DISCRIMINATORY
OR IN BAD FAITH, WHETHER OR NOT THEY ARE
MEMBERS OF THAT TRADE UNION.

WE ASSURE ALL EMPLOYEES REPRESENTED BY LOCAL NO. 1 OF
THE CANADIAN UNION OF PUBLIC EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES
WITH THESE RIGHTS.

WE WILL NOT TAKE ANY ACTION AGAINST ANY
MEMBER OR EMPLOYEE REPRESENTED BY US
WITHOUT GIVING ADEQUATE NOTICE TO SUCH
MEMBER OR EMPLOYEE AND WITHOUT FIRST
GIVING HIM A REASONABLE OPPORTUNITY
TO BE HEARD BY THE UNION.

WE WILL NOT THREATEN OR ENGAGE IN ANY
ILLEGAL STRIKE, WORK STOPPAGE OR SLOWDOWN
TO REDRESS A COMPLAINT AGAINST ANY MEMBER
OR EMPLOYEE REPRESENTED BY US.

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS
ARBITRARY, DISCRIMINATORY OR IN BAD FAITH
IN THE REPRESENTATION OF ANY MEMBER OR
EMPLOYEE.

WE WILL COMPLY WITH ALL ORDERS OF THE ONTARIO
LABOUR RELATIONS BOARD.

WE WILL COMPENSATE REGINALD WALKER AS ORDERED
BY THE BOARD.

LOCAL NO. 1, CANADIAN UNION
OF PUBLIC EMPLOYEES

PER: _____
PRESIDENT

OCTOBER 21, 1980

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days

T-118-79 United Brotherhood of Carpenters and Joiners of America, Applicant, v. Local Union 38, St. Catharines, Ontario, Respondent, v. Group of Employees.

Trusteeship – Whether Board consenting to continuation – Membership of local divided – Unable to function without supervision

BEFORE: R. D. Howe, Vice-Chairman and Board Members L. Hemsworth and O. Hodges.

APPEARANCES: B. Chercover, T. G. Harkness and B. Wunovic for the applicant; no one appeared for the respondent; Rocco Condirston, George Rowe, Peter J. Hanshar, Joseph Haberer, Henry Forget, H. Winter, Donald Lea, G. Belanger, Stanley Warren, Robert I. Meredith and Arthur Varty for the Group of Employees.

DECISION OF THE BOARD; October 3, 1980

1. This is an application under section 73(2) of *The Labour Relations Act*.
2. The applicant, United Brotherhood of Carpenters and Joiners of America, assumed supervision or control over its Local Union 38 ("Local 38") on May 7, 1979 on the recommendation of a committee appointed by the General President of the applicant on January 17, 1979. After conducting three days of hearings in St. Catharines, the committee issued a report in March of 1979 in which it made 17 "findings" and a number of recommendations, including a recommendation that Local 38 "be placed under full supervision." John Carruthers, a member of the applicant's General Executive Board, was appointed as the supervisor of Local 38 with Thomas Harkness as his assistant. (These two persons are hereinafter referred to as the "Supervisors").
3. This application was filed on April 8, 1980 and the matter was scheduled for hearing on May 13, 1980 in Toronto. At the request of several members of Local 38 who desired to attend the hearing to give evidence in relation to the application, the Board adjourned the hearing to August 7, 1980 in St. Catharines. A continuation of that hearing was held in Jordan Station on September 26 and 27, 1980.
4. In addition to the evidence of Assistant Supervisor Thomas Harkness (the applicant's Regional Director of Organization), the Board received testimony from nine members of Local 38. Mr. Harkness testified that although most of the circumstances set forth in the report (as the bases for the recommendation that Local 38 be placed under supervision) have been remedied, there remains a substantial problem of friction, disharmony, lack of unity and lack of co-operation among the members. It was his evidence that there are "four factions" within Local 38 which are unable to reach agreement on anything.
5. As a result of serious "disruption" which continued to take place at meetings of Local 38, in June of 1979 the Supervisors cancelled all executive and monthly meetings of the Local for an indefinite period of time. Local 38 President Peter Hanshar and Vice-President George McCabe were removed from office by the Supervisors as was Arthur Varty, one of the two business representatives of Local 38. Thereafter, only meetings called for special purposes (such as ratification of a province-wide collective agreement) were held. The Supervisors attempted to resume monthly membership meetings on February 25, 1980 but found to their dismay that excessive friction, disharmony, lack of unity and lack of co-operation among the

members continued to preclude the proper functioning of the Local. Accordingly, the applicant found it necessary to apply for a continuation of supervision.

6. The applicant requests that the Board consent to the continuation of supervision until February 28, 1981. In support of this request, the applicant presented a plan of action for the proposed period of continuation. During the course of the hearing, the applicant substantially revised its plan of action as a result of suggestions and constructive criticisms made by members of Local 38 during their testimony before the Board. Ultimately, Mr. Harkness and counsel for the applicant gave undertakings to the Board that the following steps, which counsel consented to being made conditions of Board consent to continuation of supervision, would be taken if the Board consents to the continuation of supervision until February 28, 1981:

- (1) Regular meetings of Local 38 will resume on a monthly basis commencing in October of 1980.
- (2) The following three persons, who in the opinion of the Supervisors are major causes of disruption at meetings, will be prohibited from attending the regular monthly meetings of the Local during October, November and December of 1980, and January of 1981: Arthur Varty, Peter Hanshar and Rocco Condirston.
- (3) Supervision will be terminated on or before February 28, 1981. Nominations of officers of Local 38 will take place at the February, 1981 regular monthly meeting of the Local. The election of officers will occur at the March, 1981 meeting of the Local.
- (4) In the interim period preceding the election, ten persons will be appointed as officers on a pro tem basis to run Local 38 with the assistance of the Supervisors. The role of the Supervisors will diminish as the ten persons gain more experience. (Mr. Harkness testified that he has contacted ten persons who are willing to accept appointment to the Local 38 executive on a pro tem basis if supervision continues and if the aforementioned three persons are excluded from the meetings.)
- (5) The Supervisors will provide for consideration by the members of Local 38 a draft amendment of the By-laws of the Local under which the position of business agent will be changed from an elected position to one appointed by the executive of the Local on application by members. A second aspect of the draft amendment will be a provision which prevents a person from holding any other office in the Local while he is a business agent for the Local.
- (6) The Supervisors will consult counsel with respect to the legality of precluding persons who have been business agents of the Local from holding other offices in the Local for a specified period of time after they cease to be business agents. Counsel will consider the legality of such exclusion in light of the Constitution and By-laws and, if it is found to be permissible, counsel will provide George Rowe with amendment language necessary to accomplish this change.

7. Section 73 provides as follows:

“73.(1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption, but such supervision or control may be continued for a further period of twelve months with the consent of the Board.”

In *Operative Plasterers' and Cement Masons' International Association of the United States and Canada*, [1978] OLRB Rep. March 223, the Board described the purpose and scope of section 73 as follows:

“10. Section 73(1) requires that when a trade union places a subordinate local under trusteeship (using that term to refer to all manner of supervision and control) it must file certain information concerning the trusteeship with the Board. The Act, however, places no impediments or constraints on a union when it places a local under trusteeship. This lack of impediments or constraints would appear to reflect a recognition on the part of the Legislature that most trusteeships are imposed as a result of real and legitimate concerns on the part of the union involved. For example, a trusteeship may be imposed because of mismanagement or dishonest use of local funds, *because a local has become so torn by dissent that it cannot function properly*, or perhaps to remove officers who have either become dictatorial or who have failed to administer the local in a responsible manner. At times, particularly with small locals, a trusteeship may be imposed simply because none of the members of the local are willing to assume the responsibilities of elected office.

11. The Legislation recognizes that trusteeships generally have a legitimate purpose, but it also places restrictions on their duration. Trusteeship is inevitably accompanied by a restriction on the ability of the local's membership to participate in the government of the local or to have a say in the policies adopted by the local. The longer the trusteeship is allowed to continue the more serious will become the resulting denial of self-government and the greater will be the likelihood that the policies and practices adopted by the local will not be reflective of the wishes of the local's membership.

12. In essence then, section 73 appears to be an attempt by the Legislature to balance the legitimate interests of a union which may require the suspension of a local's autonomy against the desirability of local self-government through officers elected by, and responsible to, the local membership. The section allows a full twelve months in which a union can resolve the problems which led to the trusteeship being imposed. The very existence of such a time limit should prompt responsible union officials to move with reasonable dispatch to correct the problems which led to the imposition of trusteeship. The section, however, also makes allowance for the fact that not every problem which leads to a trusteeship being imposed may be able to be resolved in 12 months, and thus some flexibility has been provided by stipulating that trusteeships can be continued for a further period of 12 months with the consent of the Board. Because of the Act's obvious concern with the length of trusteeships, the most reasonable interpretation of the section is not that a trusteeship must be extended for a further 12 month period in every case, but rather that it can be extended for any period of time up to 12 months. This is clearly the view which was adopted by the Board in *The United Brotherhood of Carpenters and Joiners of America* case, [1972] OLRB Rep. Sept. 833 where just prior to the expiration of the first 12 months of a trusteeship the Board agreed to the continuation of the trusteeship until such time as it issued a further decision in the matter. Approximately 4 months later the Board issued a second decision wherein it refused to grant its consent to any further continuation of the trusteeship.

13. A union which requests the consent of the Board to a continuation a trusteeship always faces the possibility that such consent may not be granted. In some instances – particularly where a local executive exists or where there is sufficient time to conduct local elections before the end of the initial 12 months period – a refusal on the part of the Board to any continuation of a trusteeship might not result in any serious disruption in the local's affairs. However, where there is no local executive and little or no time available in which to conduct elections, a refusal to consent to a continuation might well result in a serious upheaval in the affairs of the local. Another possibility is that the Board in certain circumstances might become of the view that a lengthy continuation of a trusteeship would not be justified but that it should grant its consent to a continuation solely for the purpose of allowing the trusteeship to be brought to an orderly end." [Emphasis added.]

8. All the persons who testified before the Board, including Mr. Harkness, shared the common goal of bringing supervision to a conclusion as quickly as possible so as to restore the normal democratic processes and autonomy of the Local. However, views differed concerning how soon such restoration could effectively be accomplished. Although a few witnesses expressed the view that supervision should be removed immediately since, in their view, it should not have been imposed in the first place, the testimony of the majority of the witnesses reflects the view that control of meetings by someone from outside the Local continues to be necessary to the effective operation of the Local at the present time. Moreover, at least one of the three persons proposed for exclusion from meetings on a short term basis as described above, recognized that his exclusion might be in the best interest of the Local. Several

witnesses also recognized the desirability of injecting "new blood" into the leadership of the Local to avoid a recurrence of the problems which the Local has experienced in the past. Accordingly, Mr. Harkness proposes to appoint a pro tem executive and provide them with a four-month period during which they can gain experience with the assistance of the Supervisors in the relatively calm atmosphere which will be insured by the exclusion of the three persons who, in the opinion of Mr. Harkness (which opinion was shared by some of the other witnesses who testified before the Board), have been one of the major causes of the severe disruption and friction at meetings of the Local. Although barring certain members from attending meetings of the Local on a short term basis is a very serious step, it is, as noted by Mr. Harkness, a much less drastic step than expelling or suspending those persons from membership in the Local.

9. Continuation of supervision beyond its initial year of operation is a serious matter which will not be countenanced by this Board in the absence of compelling circumstances. However, having regard to all the evidence before it and the submissions of the parties, the Board finds that Local 38 has become so torn by dissent that it cannot function properly. The Board further finds the plan of action which the applicant has undertaken to implement, to be reasonable in the circumstances of this case. Accordingly, the Board hereby approves the continuation of supervision of Local 38 by the applicant until February 28, 1981, conditional upon fulfilment by the applicant of the aforementioned undertaking.

10. The Board will remain seized of this matter in the event that any difficulties arise concerning its implementation.

1030-80-M Westmount Hospital, Applicant, v. Ontario Nurses' Association, Respondent.

Employee – Practice and Procedure – Application under section 95(2) made during term of collective agreement – Examination restricted to changes in duties since commencement of agreement – Board policy under section 95(2) reviewed

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

DECISION OF THE BOARD; October 6, 1980

1. This is an application under section 95(2) of *The Labour Relations Act*, requesting the Board to determine whether the Head Nurses employed at the applicant hospital are "employees" within the meaning of the Act.

2. The respondent Ontario Nurses' Association asks the Board to dismiss the application on the ground that the Head Nurses have already been determined, by a decision of the Board dated February 3, 1976, to be "employees" within the meaning of the Act. The respondent takes the position therefore that the issue is *res judicata*.

3. The Board does apply a doctrine analagous to *res judicata* to situations of this kind.

See *Central Park Lodges*, Board File No. 2049-79-M, released March 12, 1980. That doctrine does not, however, preclude a fresh application where the duties and responsibilities have changed in a material way from those before the Board in its prior determination. That is precisely what is alleged by the applicant in the present case. The Board would, therefore, normally appoint a Labour Relations Officer limited to inquiring into the changes in duties and responsibilities since the date of the prior application.

4. The parties, however, are currently bound by the collective agreement entered into on May 12, 1980. Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a “question” exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer in inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that the appointment should not be limited to “changes”, it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment.

5. In the present case, as noted, the parties are in fact covered by an existing collective agreement. The Board accordingly appoints an officer to inquire into changes in the duties and responsibilities of the Head Nurses since the date the collective agreement was entered into, and to report to the Board thereon.

0939-80-U Local 1979 Retail Clerks International Union affiliated with the Canadian Labour Congress, AFL-CIO, Applicant, v. **Wilson Automotive (Belleville) Ltd.**, Respondent.

Duty to Bargain in Good Faith – Union and Company agreeing on final offer – Company demanding ratification vote – Whether entitled to vote – Whether refusal to execute agreement until vote is bargaining in bad faith (Dissent of F. W. Murray – Majority Decision reported in [1980] OLRB Rep. Sept. 1337)

DECISION OF BOARD MEMBER F. W. MURRAY; October 29, 1980

1. I dissent.
2. My notes indicate that on October 18th, 1979, there were between 28 to 30 employees in the original bargaining unit when the union declared strike action and 9 employees went on strike.
3. I cannot agree with my colleagues with respect to their analysis of the bargaining process as described in paragraphs 12 and 13. I would have thought that at some point in bargaining a company will often offer the maximum it believes it can afford with the hope that the employees might accept it, and in most cases has reason to believe that a union will properly poll its members before making any decision to embark on strike action. Today it is safe to say that most trade unions do poll their members before embarking on strike action. Here again I do not agree with my colleagues' characterization of section 34e as being a safety valve. I would have interpreted it to mean that the new section was designed to guarantee the process adopted by most trade unions, namely, the proper polling of their members before embarking on a strike.
4. In the process of collective bargaining many important elements are always subject to change with the passage of time. Certainly the economics of an offer, both from the standpoint of the union's willingness to accept, or indeed the company's willingness to pay, can be altered within a matter of days, or hours, as a result of external developments or actions taken by the other party. The Board has supported the concept that an employer may reduce the economic offer made in later attempts to settle a strike because of his inability at a new point in time to meet the offer originally proposed. (See *The Toronto Jewellery Manufacturers Association*, [1979] OLRB Rep. July 719.)
5. The Board, of course, must be vigilant to ensure that an employer recognizes the certified trade union as the bargaining agent and the only bargaining agent for its employees. However, not only do economic realities change, but so indeed will the relationship between the parties alter when either one embarks on an action that will either destroy or seriously hurt the other. It is not surprising, in the instant case, to find in effect that the employer's confidence in the union's ability to represent the employees was somewhat shaken when it found the union embarking upon, and continuing, a costly strike action that obviously had the support of less than one-third of the employees in the bargaining unit.
6. The union's action on March 28th, in which it permitted only 6 employees out of a total of 25, or 25% (18 working and 6 on strike) to vote on the acceptance or rejection of the offer made in October, would also not inspire confidence.

7. I do, however, agree with the majority that the wording of section 34e is clear, and that the employer is not entitled to ask for a vote when there are no "matters remaining in dispute between the parties." I would not, however, have concluded under all of the circumstances that the employer's conduct in asking for a vote under section 34e was a breach of section 14, with respect to his duty to bargain.

8. In light of the applicant's behaviour in this case I would have denied granting it any remedy.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1980

BARGAINING AGENTS CERTIFIED DURING SEPTEMBER

No Vote Conducted

2091-79-R: Ontario Public Service Employees Union, (Applicant) v. Ontario Metis and Non-Status Indian Association, (Respondent) v. Group of Employees, (Objectors).

Unit: "All employees of the respondent working in the Province of Ontario, save and except the President, Vice-President, Secretary-Treasurer, Programme Directors, Assistant Programme Directors, Executive Assistant to the Executive Committee, Executive Secretary to the Executive Committee and Head of Financial Services." (66 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2220-79-R: United Steelworkers of America, (Applicant) v. Midnorthern Appliance Industries Corp., (Respondent).

Unit: "all employees of the respondent working at or out of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, dispatchers, call takers, office and sales staff and students employed during the school vacation period." (38 employees in the unit). (*clarity note*).

2238-79-R: Ontario Nurses' Association, (Applicant), v. Charlotte Eleanor Englehart Hospital, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Petrolia, Ontario, save and except supervisors, persons above the rank of supervisor, employee health nurse, and persons regularly employed for not more than 24 hours per week." (15 employees in the unit). (*Having regard to all of the evidence, the submissions of the parties, and the aforementioned agreement of the parties*).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than 24 hours per week by the respondent in Petrolia, Ontario, save and except supervisors, persons above the rank of supervisor, and employee health nurse." (29 employees in the unit). (*Having regard to all of the evidence, the submissions of the parties, and the aforementioned agreement of the parties*).

2317-79-R: United Steelworkers of America, (Applicant) v. Blue Mountain Pottery Division of Heritage Silversmiths Limited, (Respondent), v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Collingwood, Ontario, save and except assistant foremen, persons above the rank of assistant foreman, office, sales and retail store staff." (77 employees in the unit). (*Having regard to the agreement of the parties*).

2367-79-R: Sault Ste. Marie Typographical Union No. 746 (ITU), (Applicant), v. The Sault Star A Division of Southam Inc., (Respondent).

Unit: "all employees of the respondent employed in Sault Ste. Marie, Ontario, employed in the news editorial and library department, including full-time district correspondents in the area of Wawa and Thessalon, save and except the publisher, editor, news editor, city editor, chief editorial writer, confidential secretaries to the publisher and editor, persons regularly employed for not more than 24

hours per week and students employed during the school vacation period.” (27 employees in the unit). (*Having regard to the agreement of the parties*).

0116-80-R: Canadian Union of Public Employees, (Applicant), v. Captain Kid Ltd., (Respondent).

Unit: “all employees of the respondent in the region of Ottawa-Carleton, save and except programme supervisors, persons above the rank of programme supervisor, office staff and cooks.” (7 employees in the unit).

0119-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Norstern Meat Packers Limited, (Respondent).

Unit: “all office and clerical employees of the respondent at Kitchener, Ontario, save and except office manager and persons above the rank of office manager.” (2 employees in the unit).

0311-80-R: Canadian Union of Public Employees, (Applicant) v. Board of Water Commissioners for the Town of Lindsay, (Respondent).

Unit: “all office and clerical employees of the respondent in Lindsay, Ontario, save and except the Administrator.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0314-80-R: Labourers’ International Union of North America, Local 183, (Applicant), v. Deltan Realty and/or Dell Property Management and/or York Condominium Corporation No. 426, (Respondent).

Unit: “all employees of the respondent York Condominium Corporation No. 426 engaged in cleaning and maintenance at 2050 Bridle Towne Circle, Scarborough, Ontario, including resident-superintendents, save and except property manager, persons above the rank of property manager, office and clerical staff.” (3 employees in the unit). (*Having regard to the further agreement of the parties*).

0322-80-R: Canadian Union of Public Employees, (Applicant), v. Pine Villa Nursing Home Inc., (Respondent #1) v. The New Village Retirement Home Limited, (Respondent #2) v. Employee, (Objector).

Unit #1: “all employees of the Respondent #1 in Stoney Creek, Ontario, save and except professional medical staff, supervisor and persons above the rank of supervisor.” (12 employees in the unit).

Unit #2: “all employees of the Respondent #2 in Stoney Creek, Ontario, save and except supervisors and persons above the rank of supervisor.” (7 employees in the unit).

0509-80-R: The Halton Board of Education Office Personnel Association, (Applicant) v. The Halton Board of Education, (Respondent) v. Group of Employees, (Objectors).

Unit: “all office, clerical and technical employees employed by the Halton Board of Education in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Education, secretaries to the Board, secretary to the Superintendent of Business and Finance, secretary of the Area Superintendent (Finance), secretary to the Superintendent of Instruction, secretary to the Superintendent of Programs, secretary to the Superintendent of Special Services, Planning Assistant, Testing Assistant, Personnel and Employee Relations staff, transportation staff, computer manager, computer personnel above the rank of computer operator, instructional media staff above the rank of senior technician, salary control clerk, internal audit department, Recording Secretary to the Administrative Council, Business Managers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (210 employees in the unit). (*In conformity with the agreement of the parties*).

0673-80-R: Ontario Public Service Employees Union, (Applicant), v. Kawartha-Haliburton Children’s Aid Society, (Respondent).

Unit: "all employees of the respondent working in the Counties of Peterborough, Victoria and Haliburton, Ontario, save and except the senior Secretary, senior Bookkeeper, supervisors and persons above such rank." (33 employees in the unit). (*Having regard to the agreement of the parties*).

0730-80-R: United Food and Commercial Workers International Union, (Applicant) v. Beatrice International (Canada) Ltd. Malcolm Condensing Company Division, (Respondent), Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Village of St. George, save and except supervisor, persons above the rank of supervisor, laboratory staff, office staff, sales staff, students employed during the school vacation period and employees employed for twenty-four hours per week or less." (38 employees in the unit).

0735-80-R: Canadian Union of Public Employees, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit: "all employees of the respondent employed at Carleton University, Ottawa, Ontario, save and except food service managers, supervisors of the bakery, cooks, and dishroom, those above the rank of supervisor, office, and clerical staff, those employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0792-80-R: Canadian Union of Public Employees, (Applicant) v. Regency Residence, (Respondent).

Unit: "all employees of the respondent in Sudbury, Ontario save and except Administrator, Director of Nursing, Maintenance and Services Manager, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0909-80-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Tricil Limited, (Respondent).

Unit: "all employees of the respondent in the City of Hamilton, Ontario and in the Town of Dundas, Ontario engaged in the respondent's Transfer Operation, save and except foremen, those above the rank of foreman, office and sales staff, and persons covered by subsisting collective agreements." (26 employees in the unit).

0923-80-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. Ault Foods Limited, (Respondent).

Unit: "all employees of the respondent at their warehousing operation in the City of Brampton, save and except foremen, persons above the rank of foreman, office and sales persons, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0941-80-R: Ontario Public Service Employees Union, (Applicant) v. Parkdale Activity-Recreation Centre Inc., (Respondent).

Unit: "all employees of the respondent employed in or out of the Municipality of Metropolitan Toronto." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0956-80-R: Canadian Union of Public Employees, (Applicant) v. Welland District Association for Retarded Incorporated, (Respondent).

Unit: "all employees of the respondent in A.R.C. Industries in the Regional Municipality of Niagara, save and except supervisors and those above the rank of supervisor, office and clerical staff, and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0968-80-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Daheim Nursing Home Limited, (Respondent).

Unit: "all employees of Daheim Nursing Home Limited in Uxbridge, Ontario, save and except professional nursing staff, physio-therapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (29 employees in the unit). (*Having regard to the agreement of the parties*).

0974-80-R: Ontario Taxi Association 1688 C.L.C., (Applicant) v. Union Taxi Company, (Respondent).

Unit: "all dependent contractors employed by the respondent and working at the City of Niagara Falls." (10 employees in the unit).

0978-80-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, (Applicant) v. Gord Edwards Plumbing & Heating Inc., (Respondent).

Unit #1: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Unit #2: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0989-80-R: Canadian Union of Restaurant and Related Employees, (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q., (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 2130 Lawrence Avenue East, in the Municipality of Metropolitan Toronto, save and except hostesses and persons above the rank of hostess." (47 employees in the unit). (*Having regard to the agreement of the parties*).

0990-80-R: Retail Clerks Union, Local 206 chartered by United Food & Commercial Workers International Union, (Applicant) v. Peterborough Bearings Ltd., (Respondent).

Unit: "all employees of the respondent at Peterborough, Ontario, save and except the Store Manager, Sales Manager and persons above the rank of Store Manager and Sales Manager." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0991-80-R: Ontario Nurses' Association, (Applicant) v. Guildwood Villa, (Respondent).

Unit: "all registered and graduate nurses engaged in a nursing capacity by Guildwood Villa, Scarborough, Ontario, save and except the Director of Nursing and persons above the rank of Director of Nursing." (12 employees in the unit). (*Having regard to the agreement of the parties*).

0992-80-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., (Applicant), v. Daheim Nursing Home Limited, (Respondent).

Unit: "all registered nurses, graduate nurses, and undergraduate nurses employed at Daheim Nursing Home in Uxbridge, Ontario, save and except head nurses, supervisors, persons above the rank of supervisor or head nurse, and persons regularly employed for not more than twenty-four (24) hours per week." (2 employees in the unit). (*Having regard to the agreement of the parties*).

1003-80-R: Amalgamated Clothing & Textile Workers Union, (Applicant) v. Harvey Woods Limited Sportswear Division, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (25 employees in the unit). (*Having regard to the agreement of the parties*).

1007-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Gamble Robinson, Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of Sturgeon Falls, save and except foremen, persons above the rank of foreman, office staff and sales staff." (25 employees in the unit). (*Having regard to the agreement of the parties*).

1008-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Edwards & Gunn Limited, (Respondent).

Unit: "all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, persons above the rank of party chief, draftsmen, sales, office and clerical staff, and students employed during the school vacation period." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1012-80-R: Laundry, Dry Cleaning and Dye House Workers International Union, Local 351, (Applicant) v. Town Inn Hotel, (Respondent).

Unit: "all employees of the respondent employed at its hotel in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, front desk cashiers and staff, payroll clerks, accounting and audit staff, secretaries, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (33 employees in the unit). (*Having regard to the agreement of the parties*).

1015-80-R: Millworkers Local 802 – United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cremasco Woodwork, (Respondent).

Unit: "all employees of the respondent in the Town of Lasalle, save and except foremen, persons above the rank of foreman, office and sales staff." (2 employees in the unit).

1029-80-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., (Applicant) v. Kalar Road Residence of Greater Niagara Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent employed in Niagara Falls, Ontario, save and except forepersons and supervisors, persons above the rank of foreperson or supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1031-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Personalized Leasing Services Limited, (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, save and except head mechanic, foremen, persons above the rank of head mechanic and foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1046-80-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Kalar Road Residence of Greater Niagara Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in Niagara Falls, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except forepersons and supervisors, persons above the rank of foreperson or supervisor and office staff." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1058-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Birla Industries Inc., (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (38 employees in the unit). (*Having regard to the agreement of the parties*).

1061-80-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant) v. Tacher Enterprises Ltd., (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1066-80-R: Ontario Public Services Employees Union, (Applicant) v. Neighbourhood Legal Services, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except staff lawyers." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1074-80-R: Brotherhood of Railway, Airline & Steamship Clerks Freight Handlers Express & Station Employees, (Applicant) v. Canadian Travel Advisors Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, sales representatives, product and creative coordinators, executive secretary, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in the unit). (*Having regard to the agreement of the parties*).

1080-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Taggart Construction Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Unit #2: "all employees of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, excluding the industrial commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1084-80-R: United Steelworkers of America, (Applicant) v. Niagara Metals (A Division of Allis-Chalmers Canada Inc.), (Respondent).

Unit: "all employees of the respondent in Niagara Falls, save and except foremen, persons above the rank of foreman, office, sales staff and persons employed for not more than 24 hours per week," (17 employees in the unit). (*Having regard to the agreement of the parties*).

1085-80-R: United Steelworkers of America, (Applicant) v. Douglas Steel Company, (Respondent).

Unit: "All employees of the respondent in Oshawa, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the summer vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1092-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Con-Elco Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Unit #2: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1095-80-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Henshaw's Produce Ltd., (Respondent).

Unit: "all employees of the respondent at Burlington, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1129-80-R: United Food and Commercial Workers International Union, Local 633, AFL-CIO-CLC, (Applicant) v. Moss Park Meats Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except managers, those above the rank of manager, persons employed regularly for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1130-80-R: London and District Service Workers' Union, Local 220, (Applicant) v. Oxford County Roman Catholic Separate School Board, (Respondent).

Unit: "all employees of the respondent engaged in maintenance, services and plant operations regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman and office staff." (6 employees in the unit). (*Having regard to the agreement of the parties*).

Applications Certified Subsequent to a Pre-Hearing Vote

0786-80-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Markham, (Respondent).

Unit: "all office, clerical and technical employees of the respondent in the Town of Markham, save and except department heads, deputy department heads, professional engineers, senior planners, superintendent of operations, superintendent of facilities, superintendent of parks, superintendent of recreation, superintendent of waterworks, building office superintendent, fleet superintendent, co-ordinator of transit, co-ordinator of aquatics, pool supervisor II, co-ordinator of programmes, programme supervisor, chief works inspector, chief surveyor, chief building inspector, maintenance supervisor, centre and arena managers, fitness centre managers, parks foremen, works foremen, personnel officer, purchasing agent, payroll clerks, secretary to the mayor and chief administrative officer, secretary to the town of engineer, secretary to the solicitor, secretary of the planning director, secretary to the treasurer, secretary to the building director, secretary to the director of parks and recreation, secretary to the fire chief, secretary to the town clerk, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, post secondary students employed on a co-operative training programme and persons covered by a subsisting collective agreement between the Corporation of the Town of Markham and the Canadian Union of Public Employees, Local 1219." (88 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		90
Number of persons who cast ballots		76
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	40	
Number of ballots marked against applicant	24	
Ballots segregated and not counted	11	

0945-80-R: Canadian Textile and Chemical Union, (Applicant) v. Solaray, Division of Sunbeam Corporation (Canada) Limited, (Respondent) v. Amalgamated Clothing and Textile Workers-Union AFL-CIO-CLC, (Intervener).

Unit: "all employees of the respondent at Brantford, Ontario, save and except foremen, foreladies, persons above the rank of foreman, forelady, office and sales staff, laboratory personnel, persons regularly employed for not more than 24 hours per week, and students employed during a school vacation period." (159 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		199
Number of persons who cast ballots	177	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	170	
Number of ballots marked in favour of intervener	6	

0951-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Maedel's Beverages Limited, (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, (Intervener).

Unit: "all employees of the respondent at Chatham and Essex, Ontario, save and except foremen, route managers, persons above the rank of foreman or route manager, office staff and students regularly employed for the summer vacation period." (42 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer		46
Number of persons who cast ballots	42	
Number of ballots marked in favour of applicant	40	
Number of ballots marked in favour of intervener	2	

0957-80-R: Service Employees International Union, Local 204 Affiliated with A.F. of L., C.I.O., and C.L.C., (Applicant) v. The Brantford General Hospital, (Respondent).

Unit: "all employees of The Brantford General Hospital regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional medical staff, graduate pharmacists, graduate dietitians, students dietitians, technical personnel, supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements." (37 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		105
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant	27	
Number of ballots marked against applicant	12	

Applications Certified Subsequent to a Post-Hearing Vote

2038-79-R: Canadian Union of Public Employees, (Applicant) v. Espanola Board of Education, (Respondent).

Unit #1: "all employees of the Espanola Board of Education employed in its maintenance services and plant operations, save and except business administrator, persons above the rank of business administrator, director of education, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (19 employees in the unit).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant	19	
Number of ballots marked against applicant	1	

Unit #2: (See Certifications Dismissed – Post Hearing Vote).

0407-80-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Central Hospital, (Respondent) v. Ontario Public Service Employees Union (Intervener #1) v. Association of Allied Health Professionals: Ontario, (Intervener #2) v. Group of Employees, (Objectors).

Unit: "all employees of Central Hospital in Metropolitan Toronto, Ontario, save and except professional and medical staff, graduate nursing staff, undergraduate nursing staff, graduate pharmacists, social workers, therapists, student therapists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, security guards, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, and persons covered by subsisting collective agreements." (79 employees in this unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer		109
Number of persons who cast ballots	87	
Number of ballots marked in favour of applicant	72	
Number of ballots marked against applicant	15	

0487-80-R: Amalgamated Clothing and Textile Workers Union – Toronto Joint Board, (Applicant) v. Tiny Tots Knitting Mills Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman and forelady, designers, office and sales staff, homeworkers, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (44 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names on revised voters' list		40
Number of persons who cast ballots	40	
Number of ballots marked in favour of applicant	21	
Number of ballots marked against the applicant	19	

0684-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Cathcart Freight Lines (Peterborough) Ltd., (Respondent) v. Canadian Transportation Workers Union No. 200 N.C.C.L., (Intervener).

Unit: "all employees of the respondent employed at, or working out of the respondent's terminal at Peterborough, Ontario, save and except foremen and supervisors and persons above the rank of foreman and supervisor, and office staff." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of person who cast ballots	14	
Number of ballots marked in favour of the applicant	8	
Number of ballots marked in favour of intervener	6	

APPLICATION FOR CERTIFICATION DISMISSED

No Vote Conducted

0502-80-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Scepter Manufacturing Company Limited, (Respondent).

Certification Dismissed Subsequent to Pre-Hearing Vote

0228-80-R: Labourers' International Union of North America, Local 506, (Applicant) v. Structural Floor Finishing Limited, (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit). (*clarity note*).

Number of names of persons in revised voters' list		24
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	16	
Ballots segregated and not counted	4	

Certifications Dismissed Subsequent to Post-Hearing Vote

2038-79-R: Canadian Union of Public Employees, (Applicant) v. Espanola Board of Education, (Respondent).

Unit #1: (See Applications Certified – Post-Hearing Vote)

Unit #2: "all employees of the Espanola Board of Education regularly employed for not more than twenty-four hours per week in its maintenance services and plant operations, and students employed for the school vacation period in its maintenance services and plant operations, save and except business administrator, persons above the rank of business administrator, director of education and office staff." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	2	

0421-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Browne, Cavell & Jackson Limited, (Respondent), Group of Employees, (Objectors).

Unit: "all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except draftsmen, party chiefs, those above the rank of party chief, sales, office and clerical staff." (4 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	4	

0640-80-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Emile Viau and Glengary Bus Line Inc., (Respondents).

Unit: "all employees of the respondent Emile Viau in Charlottenburgh Township". (7 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots		11
Number of ballots marked in favour of the applicant	3	
Number of ballots marked against the applicant	7	
Ballots segregated and not counted	1	

0641-80-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Jean Poirier and Paul Emile Poirier carrying on business as Poirier Bus Lines, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Lancaster." (11 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots		12
Number of ballots marked in favour of the applicant	4	
Number of ballots marked against the applicant	8	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0655-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Gendrain Construction Limited, (Respondent).

0680-80-R: Local 46 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. United Energy, (Respondent).

0708-80-R: Local 46 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. United Energy, (Respondent).

0733-80-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada – Local Union 628, (Applicant) v. Matthews Group Limited, (Respondent) v. Labourers' International Union of North America, Local 607, (Intervener).

1036-80-R: R.J. Stampings Co. Ltd., Employee's Association, (Applicant) v. R.J. Stampings Co. Ltd., (Respondent).

1052-80-R: Labourers' International Union of North America – Local 183, (Applicant) v. Pelar Construction Ltd., (Respondent) v. Labourers' International Union of North America, Local 506, (Intervener).

1076-80-R: International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Homecrest Furniture Products Ltd., (Respondent).

1081-80-R: The Labourers' International Union of North America, Local 506, (Applicant) v. Community Nursing Homes Limited, (Respondent).

1082-80-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, Affiliated with the AFL, CIO & CLC, (Applicant) v. Skyline Hotels Ltd. (Ottawa) – York-Hannover, 101 Lyon Street, Ottawa, Ontario, (Respondent).

1111-80-R: Labourers' International Union of North America, Local No. 506, (Applicant) v. Lido Plastering Ltd., (Respondent), v. International Brotherhood of Painters and Allied Trades of The Ontario Council of The International Brotherhood of Painters and Allied Trades - Local Union 1891, (Intervener).

1156-80-R: Canadian Union of Public Employees, (Applicant) v. St. Michael's Hospital, (Respondent).

APPLICATION UNDER SECTION 1(4)

0403-80-R: United Cement, Lime & Gypsum Workers International Union, (Applicant) v. Plastics Painters of Canada, Division of 440172 Ontario Limited and Barry J. Lawrence Management Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0325-80-R: Joe Saudade, (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 1285, (Respondent) v. The Butcher Engineering Enterprises Ltd., (Intervener).

Unit: "all employees of The Butcher Engineering Enterprises Ltd. at Brampton, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (87 employees). (*Granted*).

Number of names of persons on revised voters' list		99
Number of persons who cast ballots		88
Number of ballots marked in favour of the respondent	17	
Number of ballots marked against the respondent	71	

0470-80-R: Ramona M. McInnis, (Applicant) v. Amalgamated Clothing & Textile Workers Union, (Respondent) v. Federal Packaging and Partition Company Limited, (Intervener).

Unit: "all employees of Federal Packaging and Partition Company Limited at its Ajax, Ontario plant, save and except foreman, foreladies, and persons above the rank, sales and office staff, students employed during the school vacation periods and persons regularly employed for twenty-four hours per week or less." (84 employees). (*Granted*).

Number of names of persons on revised voters' list		89
Number of persons who cast ballots		86
Number of ballots marked in favour of respondent	28	
Number of ballots marked against respondent	58	

0947-80-R: Lee Linn, (Applicant) v. The Canadian Union of Public Employee's and its Local #246, (Respondent). (3 employees). (*Withdrawn*).

0948-80-R: Bob Brewer, (Applicant) v. The Canadian Union of Public Employees and its Local #246, (Respondent), (3 employees). (*Withdrawn*).

0949-80-R: Tom Sovie, (Applicant) v. The Canadian Union of Public Employees and its Local 246, (Respondent), (4 Employees). (*Withdrawn*).

0950-80-R: Robert Cameron, (Applicant) v. The Canadian Union of Public Employees and its Local #246, (Respondent), (10 employees). (*Withdrawn*).

1022-80-R: Charles A. Crerar – on behalf of a Group of Employees, (Applicant) v. The United Steelworkers of America AFL-CIO, Local 8773, (Respondent) v. Hendrickson Manufacturing (Canada) Ltd., (Intervener), (131 employees). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

0818-80-R: Energy and Chemical Workers Union, (Applicant) v. Engelhard Industries of Canada Limited, (Respondent). (*Granted*).

0910-80-R: United Steelworkers of America, (Applicant) v. The Canadian Coleman Company, Limited, (Respondent). (*Granted*).

1025-80-R: United Steelworkers of America, (Applicant) v. Johnson Matthey Limited, (Respondent). (*Granted*).

1068-80-R: United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Dees Beef Limited, (Respondent). (*Granted*).

1147-80-R: Energy and Chemical Workers Union, (Applicant), v. Du Pont Canada Inc., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1105-80-U: Ford Motor Company of Canada, Limited, (Applicant) v. Essex & Kent Building and Construction Trades Council, Affiliated Building Trades Union Limited Schedule "A" hereto, and their respective Members, (Respondents). (*Withdrawn*).

1115-80-U: Dagmar Construction Limited, (Applicant) v. Labourers' International Union of North America, Local 183, Teamsters Local Union 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, R. Worden and B. Martin, (Respondents). (*Granted*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

1078-80-R: Canadian Union of Public Employees, (Applicant) v. London Board of Education, (Respondent). (*Withdrawn*).

APPLICATION FOR CONSENT TO PROSECUTE

1335-79-U: Labourers' International Union of North America, Local 183, (Applicant) v. York Hanover Developments Ltd. (K. Von Versebe in Trust) – The Lawrence Group, and Stephen Rosenberg and Margaret Fisher, and Gary Eichler and Fred Stone, (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1334-79-U: Labourers' International Union of North America, Local 183, (Complainant) v. York Hannover Developments Ltd. (K. Von Wersebe in Trust) – The Lawrence Group and Stephen Rosenburgh, Margaret Fisher, Gary Eichler and Fred Stone, (Respondents). (*Withdrawn*).

1407-79-U: Valeria Henderson, (Complainant) v. Staff Association, Children's Aid Society of the City of Sarnia and The County of Lambton and Children's Aid Society of the City of Sarnia and The County of Lambton, (Respondents). (*Withdrawn*).

1847-79-U: Alwin L.A. Campbell, (Complainant) v. Local 1785, The Canadian Union of Public Employees, It's Executive Officers and members of its Grievance Committee, (Respondents) v. The Regional Municipality of Durham, (Intervener). (*Withdrawn*).

2473-79-U: United Steelworkers of America, (Applicant) v. Blue Mountain Pottery Division of Heritage Silversmith Limited, (Respondent). (*Terminated*).

0065-80-U: Jose Defrias, (Complainant) v. The Upholsterers' International Union of North America, AFL-CIO, (Respondent). (*Dismissed*).

0069-80-U: United Steelworkers of America, (Complainant) v. Bond Structural Steel (1965) Ltd., (Respondent). (*Granted*).

0209-80-U: Canadian Union of Education Workers, (Complainant) v. Board of Governors, Ryerson Polytechnical Institute, (Respondent). (*Withdrawn*).

0242-80-U: Canadian Chemical Workers Union, (Complainant) v. Somerville Belkin Industries Limited Brockville Packaging Division, (Respondent). (*Withdrawn*).

0277-80-U: Teamsters Local Union 132, Chemical Energy and Allied Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. P.R.C. Chemical Corporation of Canada Ltd. (Respondent). (*Withdrawn*).

0402-80-U: United Cement, Lime & Gypsum Workers International Union, (Complainant) v. Plastics Painters of Canada Limited Division of 440172 Ontario Limited and Barry J. Lawrence Management Ltd., (Respondents). (*Withdrawn*).

0453-80-U: Herbert Jennings, (Complainant) v. Corporation of the City of Toronto and The Canadian Union of Public Employees, Toronto Civic Employees Union, Local Union 43, (Respondents). (*Dismissed*).

0463-80-U: Elza Freilikh, (Complainant) v. The Canadian Union of Public Employees and its Local 576, (Respondent) v. Ottawa Civic Hospital, (Intervener). (*Dismissed*).

0522-80-U: United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Scepter Manufacturing Company Limited, (Respondent). (*Withdrawn*).

0559-80-U: Mary Brennan, (Complainant) v. Hotel & Restaurant Employees' Union Local 743, Affiliated with the Hotel and Restaurant Employees and Bartenders International Union W and DLC and CLC, (Respondent). (*Dismissed*).

0661-80-U: Leonardo C. Cutone, (Complainant) v. Retail, Wholesale, Bakery and Confectionery Workers Union, Local 461 of the Retail, Wholesale and Department Store Union and Rowntree Mackintosh Canada Limited, (Respondent). (*Withdrawn*).

0662-80-U: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Complainant) v. O.J. Gaffney Limited, (Respondent). (*Withdrawn*).

0698-80-U: Commercial Workers Union, Local 586 chartered by the United Food and Commercial Workers International Union, (Complainant) v. General Bearing Service Ltd., (Respondent). (*Dismissed*).

0787-80-U: Canadian Union of Public Employees, (Complainant) v. Marcus Garvey Homes Inc., (Respondent). (*Withdrawn*).

0819-80-U: Erich Siebert, (Complainant) v. United Steelworkers of America, Local 1005, (Respondent). (*Dismissed*).

0840-80-U: Alex Bailey, Gary Kwiatkowski, Clarence Frigault, (Complainant) v. Local Union 38 of the United Brotherhood of Carpenters and Joiners of America and Barenly Wonovic, (Respondents). (*Dismissed*).

0847-80-U: United Brotherhood of Carpenters and Joiners of America and Alex Lessie, (Complainants) v. Markwill Industries (1979) Limited, (Respondents). (*Granted*).

0854-80-U: Canadian Union of United Brewery, Flour Cereal, Soft Drink and Distillery Workers, (Complainant) v. National Dry Company Ltd., (Respondent). (*Granted*).

0855-80-U: Canadian Union of United Brewery, Flour Cereal, Soft Drink and Distillery Workers, (Complainant) v. National Dry Company Ltd., (Respondent). (*Withdrawn*).

0862-80-U: Commercial Workers Union, Local 586 chartered by the United Food & Commercial Workers International Union, (Complainant) v. General Bearing Service Ltd., (Respondent). (*Dismissed*).

0863-80-U: Commercial Workers Union, Local 586 chartered by the United Food & Commercial Workers International Union, (Complainant) v. General Bearing Service Ltd., (Respondent). (*Granted*).

0908-80-U: Service Employees' Union, Local 204 AFL-CIO-CLC, (Complainant) v. Medi-Park Lodges Inc., (Respondent). (*Withdrawn*).

0913-80-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Around Town Trucking and Cartage, (Respondent). (*Withdrawn*).

0916-80-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Josephs Hospital, (Respondent). (*Withdrawn*).

0936-80-U: United Cement, Lime & Gypsum Workers International Union, (Complainant) v. Dufferin Aggregates, (Respondent). (*Withdrawn*).

0971-80-U: Service Employees Union, Local 204, (Complainant) v. Daheim Nursing Home, (Respondent). (*Withdrawn*).

0973-80-U: Ontario Taxi Association 1688 C.L.C. (Complainant) v. Blue Line Taxi Co. Ltd., (Respondent). (*Withdrawn*).

0975-80-U: Barbara Barrow, (Complainant) v. Canadian Union of Public Employees, Local 1742, and The Shaver Hospital for Chest Diseases, (Respondent). (*Withdrawn*).

1011-80-U: Abraham Cohen, (Complainant) v. The Association of Professional Student Services Personnel and The Board of Education for the City of Toronto, (Respondent). (*Withdrawn*).

1018-80-U: Joanne Sharon Bissett, (Complainant) v. McGaw Manufacturing (Supply), formerly Texpack, (Respondent). (*Withdrawn*).

1026-80-U: Labourers' International Union of North America, Local 183, (Applicant) v. Deltan Realty and/or Dell Property Management and/or York Condominium Corporation No. 426, (Respondent). (*Withdrawn*).

1037-80-U: Office and Professional Employees International Union, (Complainant) v. Hamilton Wentworth Credit Union Limited, (Respondent). (*Withdrawn*).

1040-80-U: Pierre Perreault, (Complainant) v. The Canadian International Paper Company Union Local 28, (Respondent). (*Withdrawn*).

1062-80-U: Claudette Isaac, (Complainant) v. Service Employees International Union, (Respondent). (*Withdrawn*).

1065-80-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. The Lamplighter Inn, (Respondent). (*Withdrawn*).

1073-80-U: United Steelworkers of America, (Complainant) v. Mintex Canada Ltd., (Respondent). (*Withdrawn*).

1075-80-U: Hotel, Restaurant & Cafeteria Employees Union, Local 75 Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L. – C.L.C. – C.I.O.), (Complainant) v. Hotel Canadiana and Mary Curran, (Respondents). (*Withdrawn*).

1077-80-U: Office and Professional Employees International Union, Local 343, (Complainant) v. Ontario Teamsters Credit Union Limited, (Respondent). (*Withdrawn*).

1097-80-U: United Steelworkers of America, (Complainant) v. Mattabi Mines Limited, (Respondent). (*Withdrawn*).

1107-80-U: David Brian McLaughlin, (Complainant) v. Chemical Energy & Allied Workers Union, (Respondent). (*Withdrawn*).

1109-80-U: United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Complainant) v. Dees Beef Limited, (Respondent). (*Withdrawn*).

1149-80-U: United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C., (Complainant) v. Dees Beef Limited, (Respondent). (*Withdrawn*).

1150-80-U: United Food and Commercial Workers International Union, (Complainant) v. W. Frank Real Estate Limited and Sam Venn, (Respondent). (*Withdrawn*).

1151-80-U: United Food and Commercial Workers International Union, (Complainant) v. W. Frank Real Estate Limited and Walter Frank, (Respondents). (*Withdrawn*).

1249-80-U: Hotels, Clubs, Restaurants, and Tavern Employees Union, Local 261, (Complainant) v. Charles Hamway, carrying on business as Cafe Contempra, (Respondent). (*Withdrawn*).

1330-80-U: The International Association of Bridge Structural and Ornamental Ironworkers District Council of Ontario; – and – The International Association of Bridge Structural and Ornamental Ironworkers Locals 700, 721, 736, 759, 765, and 786; – and – The Rodmen Employee Bargaining Agency consisting of the aforementioned trade union; – and – Kenneth Childs, Allan MacIssac, John Donaldson, Larry Bailey, Jim Lajeunesse and Don Melvin on their own behalf and on behalf of each and every member of the aforementioned trade unions, (Complainants) v. The International Association of Bridge Structural and Ornamental Ironworkers, Norman Wilson, Ontario Hydro, and the Electrical Power Systems Construction Association, (Respondents). (*Withdrawn*).

APPLICATION UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

1027-80-OH: United Steelworkers of America (Complainant) v. Haley Industries Limited (Respondent). (*Withdrawn*).

APPLICATION FOR RELIGIOUS EXEMPTION

1017-80-M: Dale W. McCann (Applicant) v. International Union of Electrical, Radio & Machine Workers. File No. 0637-80-R (Respondent Trade Union) v. International Systcoms Gary Hughes – Plant Manager (Respondent Employer). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0798-80-M: The Canadian Union of Drivers and General Workers (Trade Union) v. Wilson's Truck Lines Limited (Employer). (*Granted*).

0858-80-M: Tridon Employees' Union (Trade Union) v. Tridon Limited (Employer). (*Granted*).

APPLICATIONS UNDER SECTION 55

0294-80-R: International Association of Machinists and Aerospace Workers (Applicant) v. Nantucket Rebar Services (Respondent) v. G & H Steel Industries Limited (Intervener #1) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener #2). (*Withdrawn*).

0531-80-R: The Canadian Union of Public Employees and its Local 504, the Peterborough Civic Employees Union (Applicant) v. The Corporation of the City of Peterborough (Respondent) v. Amalgamated Transit Union, Division 1320 (Intervener). (*Dismissed*).

0679-80-R: Ontario Taxi Association 1688, C.L.C. (Applicant) v. 444598 Ontario Limited, carrying on business as "Central Cabs" (Respondent) v. Group of Employees (Objectors). (*Granted*).

APPLICATIONS FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82

1579-79-M: Ontario Public Service Employees Union (Applicant) v. Humber College of Applied Arts and Technology (Respondent). (*Granted*).

0597-80-U: The Ontario Food Division of the Oshawa Group Limited (Applicant) v. Bradford Ward, Joseph Veerasammy and Afzal Hasein et al (Respondents). (*Withdrawn*).

1280-80-U: The Board of Education for the City of London (Applicant) v. Canadian Union of Public Employees Local 190 Paul Senay, Bill Irvine, Burt Vernaleken, B. Allen, Bill Smith, Donna Stapleford, Jim Bryson, Peter Piddington, Jim Pfeifer, Matt Anderson, James Stewart, R. B. Wilkie, Bill Waddell, J. Aitken et al (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

2258-79-M: Canadian Union of Public Employees Local 11, (Applicant) v. North York Hydro Corporation (Respondent). (*Withdrawn*).

0040-80-M: Office and Professional Employees International Union, Local 165 (Trade Union) v. Canadian International Paper Company (Employer). (*Granted*).

0079-80-M: The Corporation of the City of London (Applicant) v. Local Union, No. 101, Canadian Union of Public Employees (Respondent). (*Withdrawn*).

0307-80-M: Service Employees' Union, Local 210 (Applicant) v. University of Windsor (Respondent). (*Withdrawn*).

0580-80-M: The Corporation of the City of Brampton (Applicant) v. C.U.P.E. Local 831 (Respondent). (*Granted*).

APPLICATION UNDER SECTION 96

0875-80-M: The Master Insulators Association of Ontario, Inc. representing employers listed on schedule "A" attached hereto and employers listed on schedule "B" attached hereto (Employer) v. The International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 112(a)

1766-79-M: United Brotherhood of Carpenters & Joiners of America Local 18 (Applicant) v. J. A. MacDonald (London) Ltd. (Respondent). (*Withdrawn*).

0542-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Hi-Wall Concrete Forming (Respondent). (*Granted*).

0624-80-M: The Trow Group Limited (Applicant) v. The Quality Control Council of Canada (Respondent) (*Granted*).

0871-80-M: Laurentian Electric Ltd., Bedard Girard Ontario (Applicants) v. International Brotherhood of Electrical Workers, Local Union 1687 (Respondent). (*Withdrawn*).

0882-80-M: The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 (Applicant) v. Union Carpentry Contractors Ltd. (Respondent). (*Granted*).

0894-80-M: Sheet Metal Workers' International Association Local 562 (Applicant) v. Richards Mechanical Services Ltd., and Ontario Sheet Metal and Air Handling Group (Respondents). (*Withdrawn*).

0895-80-M: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Sutherland-Schultz Limited and Ontario Sheet Metal and Air Handling Group (Respondents). (*Withdrawn*).

0896-80-M: Sheet Metal Workers' International Association Local 562 (Applicant) v. Nelco Mechanical Ltd. and Ontario Sheet Metal and Handling Group (Respondents). (*Withdrawn*).

0897-80-M: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Hebel Sheet Metal Ltd. and Ontario Sheet Metal and Air Handling Group (Respondents). (*Withdrawn*).

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Labour Relations
Board

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0239-80-R Labourers' International Union of North America, Local 506, Applicant, v. **April Waterproofing Limited**, Respondent, v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Intervener

Bargaining Unit – Certification – Construction Industry – Employee – Applicant seeking to displace incumbent union – Employer hiring employees contrary to collective agreement with incumbent – Whether employees in unit

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

***APPEARANCES:** Peter Hitchen and Mike Mahojlovic for the applicant; Gill St. Germain for the respondent; Giovanni Balanzin for the intervener.*

DECISION OF THE BOARD; November 18, 1980

1. This is an application for certification in which the applicant is seeking to displace the intervener as bargaining agent for a unit of the respondent's employees. At the time of the filing of the application, the employees in the bargaining unit were covered by a subsisting collective agreement, binding both the respondent and the intervener. In making its application, the applicant requested the taking of a pre-hearing representation vote.

2. The respondent filed a list of bargaining unit employees containing the names of four individuals. The intervener challenged the inclusion on the list of three of these individuals. The only membership evidence filed by the applicant trade union relates to two of the individuals so challenged.

3. By a decision dated May 16, 1980, a differently constituted panel of the Board directed the taking of a pre-hearing representation vote among the respondent's employees with voters being asked to indicate whether they desired to be represented by the applicant or the intervener. The vote was held on May 26, 1980, at which time two of the challenged individuals and one other employee cast a ballot. In accordance with a direction of the Board the ballots cast in the representation vote were all segregated and not counted.

4. The basis of the intervener's challenge to the three individuals in dispute is the admitted fact that a few days prior to the filing of the application, the respondent hired them directly without going through the intervener's hiring hall contrary to the provisions of the collective agreement binding upon the respondent and the intervener. Under the terms of the collective agreement, the respondent is required to inform the union of its manpower requirements, and only if the intervener cannot supply sufficient of its members to do the work involved is the respondent free to hire manpower directly. The intervener's contention is that the respondent, acting with the knowledge of the applicant, hired the individuals in dispute so as to enable the applicant to file an application for certification. This contention is disputed by both the applicant and the respondent. The respondent's position is that the person who hired the disputed individuals was simply not fully aware of the hiring provisions in the collective agreement. At the hearing the parties indicated they were not in a position to lead evidence with respect to the respondent's motivation in hiring the disputed individuals, but that they would do so at a later date if the Board considered it a relevant factor in its determination.

5. The intervener contends that since the applicant has membership support only among employees hired contrary to the terms of the collective agreement the application should either be dismissed, or in the alternative, the ballots cast by the individuals in dispute in the pre-hearing representation vote not be counted. The applicant contends that although the individuals in dispute were hired contrary to the terms of the collective agreement, nevertheless, at the relevant time they were employees of the respondent and accordingly the Board should now direct the counting of all the ballots cast in the vote.

6. Employment patterns in the construction industry differ from those in most other industries. One major difference is that the manpower requirements of most construction firms fluctuate greatly over relatively short periods of time. Not only do different projects require different size work forces, but frequently the number of tradesmen required on any particular project will vary depending on the stage of development of the project. Employment levels also vary because of cyclical and seasonal fluctuations in construction activity. For their part, most construction tradesmen are required to work for a succession of different employers. These factors have resulted in the negotiation of collective agreement terms which are unique to the construction industry. This fact is recognized in the following excerpt from the judgment of the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 8 O.R. (2d) 103 at p. 112:

In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide other benefits which may become due or payable at a time when the union member is not employed.

7. The displacement of one union's bargaining rights by another is by no means rare in the construction industry. Such cases generally involve situations where the applicant union has won over the allegiance of members of the incumbent union who were hired by the employer in accordance with the provisions of the incumbent's collective agreement. The instant case, however, involves an entirely different situation. Here, the respondent did not hire the three individuals in dispute through the intervening union as required by the terms of the relevant collective agreement, but rather, it hired them "off the street". The applicant in turn seeks to displace the intervener's bargaining rights on the basis of the fact that two of the individuals so hired are its supporters.

8. There can be little doubt but that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervener. That by itself, however, is not determinative of their status as bargaining unit employees. See *Local 273, International Longshoremen's Association v. Maritime Employer's Association*, [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account.

9. Removing the names of the three challenged individuals from the list of employees leaves only one employee who would be included in the bargaining unit on the date of the making of the application. This employee was not a member of the applicant union. Accordingly, at the time of the filing of the application, the applicant did not have as members not less than thirty-five per cent of the employees in the bargaining unit. The application is accordingly dismissed.

10. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

**1227-80-R International Union of Operating Engineers, Local 793,
Applicant, v. Bennett Paving & Materials Limited, Respondent, v.
Group of Employees, Objectors**

Charges – Practice and Procedure – Employer alleging misrepresentation by union in obtaining membership evidence – Objecting employees also filing charges – Whether employer has status to complain

BEFORE: M. G. Mitchnick, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *S.B.D. Wahl and G. Steers for the applicant; G. Grossman, B. Baker and B. Bromley for the respondent; Jack C. Walker for the objectors.*

DECISION OF THE BOARD; November 7, 1980

1. This is an application for certification in which the applicant has filed sufficient membership evidence, standing alone, to entitle it to certification without a vote. A timely statement in opposition to the application was filed by objecting employees but it was not signed by any of the employees upon whose membership evidence the applicant relies. Accordingly no evidence was heard with respect to the statement in opposition. The respondent employer, however, levied the following allegations against the applicant trade union:

“Representatives of the applicant attempted to organize the employees by stating to each of the employees individually that all of the other employees had signed up - that they were the last ones and that they might as well sign up.

Representatives of the applicant also stated to the employees that if they joined now it would only cost \$22.00 and if they did not join it would end up costing them \$382.00.

It is the position of the respondent that such organizing is improper and that therefore this application should be dismissed.”

2. The applicant takes the position that the Board ought to refuse to proceed further with the above charges, on the grounds:

- (a) that the first charge does not, as required by section 46 of the Board's Rules of Procedure, disclose a *prima facie* case; and
- (b) that the second charge relates to what the Board has characterized as a "misunderstanding", and accordingly that it is only the employees alleged to have been misled, and not the employer, who can complain to the Board, particularly when none of the employees on whose cards the applicant relies has signed the petition that is before the Board.

In support of the second ground, the applicant relies primarily on the line of cases emanating from *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288, and upon *Rexdale Heating Ltd.*, [1974] OLRB Rep. March 115, *Cunningham Drug Stores* (1972), 21 D.L.R. (3d) 459 (S.C.C.), and *Glen Fox Construction Company Limited*, Board File No. 2474-79-R, decision dated July 9, 1980.

3. In the *Cunningham Drug Stores* case, *supra*, the trade union had filed an application for certification for each of five stores of the employer. The employer took the position by letter that all 74 of its stores in British Columbia formed the appropriate unit. The British Columbia Labour Board then wrote to the employer and the trade union proposing that the 5 stores be combined into a single bargaining unit. The trade union agreed, and the result was a certificate on that basis. One of the grounds for objection ultimately put forward by the employer on appeal was that no notice of this new proposed bargaining unit had been given to the employees affected. The ground upon which the Supreme Court of Canada dismissed this objection was that the employees, having been given notice of the original applications and having filed no objection, had to be taken to have acquiesced in the trade union representing them in a unit of all employees (excluding pharmacists), and in acting as their spokesman. The Court then cited essentially without comment the *Cimon Ltée* case, (1971), 21 D.L.R. (3d) 506 in which the Court had held that a company was not entitled to invoke the rights of another party before the Board. In that latter case, the company claimed notice of a certification proceeding ought to have been given to a prior applicant for certification, notwithstanding that the prior application had since been dismissed. The company itself had at all times refused to accord any bargaining rights to the predecessor union. In both of these cases, as in the *Rexdale Heating Ltd.* case, *supra*, it is to be noted that the employer *itself* had been given full opportunity to address itself to the matters before the Board.

4. The only case received from the applicant which approximates the present situation is the decision of the Supreme Court of Canada in *C.L.R.B. and Transair Ltd. et al.*, (1976), 67 D.L.R. (3d) 421, where the learned Chief Justice stated, at page 438:

"... If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-a-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court."

In that case, the objection by the employee concerned the rejection as untimely of an employee "petition" received beyond the time limits prescribed by the Canada Board's regulations well after the completion of the Board's hearings, and indeed, on the very day the Board's certification order was about to be issued. Once again the question of *jus tertii* was not the primary ground upon which the employer's objection was rejected. But more importantly, the employee petition was a simple statement withdrawing support from the union; it contained no allegation of "fraud", or anything else which would suggest that the signing of a membership card in the first instance was anything but a voluntary act.

5. This Board of course has always accepted the statement of principle enunciated by the Chief Justice in the passage quoted above. It does, however, treat the reference to "fraud" as being intended in the broadest sense, to encompass all of those situations where membership evidence submitted to the Board does not in fact reflect the true wishes of the employees as it purports to do. The *Transair* decision was considered, for example, in the *St. Michael Shops of Canada Limited* case, [1979] OLRB Rep. Apr. 346, and the Board had this to say:

"These authorities, however, do not stand for the proposition that a party to a certification proceeding may not bring forth evidence which might raise a doubt as to the reliability of what otherwise appears to be acceptable membership evidence. In an application for certification the Board relies on hearsay evidence in determining the membership support of an applicant union. It is not feasible for the Board to hear from each individual who signed a card to ascertain his true wishes or inquire into the circumstances under which he signed a membership card. *For this system to operate effectively the Board must consider any substantial allegation which might cause the Board to doubt the reliability of the membership evidence.* To insist that employees alone may raise allegations of intimidation by a union would create an anomalous situation. The more effective the intimidation might be the less likely the Board would be to hear of the violation as its continuing effect could deter the employees from lodging a complaint. For the reasons set out above, therefore, the Board finds that the respondent company in this proceeding has status to raise the allegations of intimidation." [emphasis added]

6. The applicant in the present case, however, seeks to distinguish incidents of "intimidation" (as in the *St. Michael's* case) from those of, for example, mere misunderstanding. But having regard to the reasons for the Board's concerns, no logical basis exists for such a distinction. As the Board stated in *Alex Henry & Son Ltd.*, *supra*:

"In an application for certification the Board's concern with the nature of acts and representations made in the course of soliciting union membership is twofold. Firstly the Board must be satisfied that the applicant has avoided any conduct proscribed by *The Labour Relations Act*, including section 61. Secondly, the Board must be satisfied that any signed membership applications that the union submits in support of its request for certification are an accurate representation of the wishes of each employee and were not obtained in circumstances tainted by any procedural irregularity or misrepresentation."

and again re-affirming the principle enunciated in *St. Michael Shops of Canada Limited*, *supra*:

“The Board’s consistent policy in certification proceedings has been to require the highest standard of integrity on the part of union officers in the soliciting, gathering and presentation to the Board of documentary evidence in support of their application. Since that evidence remains confidential, is not subject to cross-examination and is the principal evidence on which the Board must rely in certification proceedings, it must be free of any cloud or taint. . .”

7. It is perhaps worth noting as well, as pointed out at the hearing by Mr. Walker, the spokesman for the group of objecting employees, that the allegations raised by the respondent employer also appear to be raised by Mr. Walker in his own correspondence to the Board. For the foregoing reasons, the Board does not rely on this in proceeding with the allegations. The petition does, however, give rise to the further argument by the applicant that the apparent failure of the persons who actually signed membership cards to sign the petition ought to persuade the Board to disregard the allegations at the outset. The applicant cites *Glen Fox Construction Company Limited*, *supra*, as authority for the proposition that the proper mechanism for a complaint of this sort is an employee statement in opposition, or petition.

8. In the *Glen Fox Construction Company Limited* case, the employees first registered their complaints of misrepresentation by filing a statement of objection with the Board some seven days after the terminal date for the application, being the date as of which the Board determines membership support pursuant to section 92(2)(j) of *The Labour Relations Act*. Notwithstanding that the true facts became known to them well in advance of the terminal date, no objection was raised with the Board by the terminal date, and the Board ruled that the complaints could therefore not affect the Board’s determination of membership support as of that critical date. The employees had in fact filed their own statement of objection, but late, in that case, and the Board did not say that that was the only means by which their complaint could come forward.

9. In the present case, the employees did register their complaints with the respondent employer in what appears to be a timely fashion. While this action would be insufficient to have any weight with the Board as a pure withdrawal of support from the applicant, the Board does find it to be an acceptable (though not the preferred) way of bringing such complaint’s to the Board’s attention. The Board, having heard no evidence at this point, directs that this matter be listed for continuation of hearing.

10. With respect to the applicant’s motion in connection with the first ground of charges, assuming that Rule 46 is broad enough to apply to a complaint raised in “defence”, the Board is of the view that the respondent in this case should be permitted to place its full evidence before the Board on the manner in which membership cards were solicited, prior to the Board making its determination on any one aspect.

11. The matter is referred to the Registrar.

1538-80-U; 1561-80-U Canada Cement Lafarge Ltd., Complainant, v. United Cement, Lime & Gypsum Workers International Union and its Local 368, Respondent.

Collective Agreement – Duty to Bargain in Good Faith – Final offer vote directed by Minister under section 34e – Majority of employee voting to accept employer's offer – Union refusing to sign – Whether employer communications grounds for refusal – Whether Union violating section 14 – Board directing execution of agreement

BEFORE: George W. Adams, Chairman and Board Members J. D. Bell and B. L. Armstrong.

APPEARANCES: *F. G. Hamilton, Q.C. and Ross Corbett for Canada Cement Lafarge Ltd.; James Hayes, Elizabeth Shilton-Lennon and George Surdykowski for the United Cement, Lime & Gypsum Workers International Union.*

DECISION OF GEORGE W. ADAMS, CHAIRMAN AND BOARD MEMBER J. D. BELL; November 18, 1980

1. These matters arise out of a common set of facts and were brought on at the same time for hearing and consolidated. Both matters were filed under section 79 and bring into issue the legal effect of section 34e of *The Labour Relations Act* together with the Board's role with respect to that provision. Section 34e provides:

(1) Before or after the commencement of a strike or lock-out, the employer of the employees in the affected bargaining unit may request that a vote of such employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties and the Minister shall, and in the construction industry the Minister may, on such terms as he considers necessary direct that a vote of such employees to accept or reject the offer be held and thereafter no further such request shall be made.

(2) A request for the taking of a vote, or the holding of a vote, under subsection 1 does not abridge or extend any time limits or periods provided for in this Act.

2. Briefly, by letter dated September 30, 1980, the solicitors for Canada Cement Lafarge Ltd. (hereinafter referred to as "CCL") requested, pursuant to section 34e(1) that there be conducted a secret ballot vote of the employees in the bargaining unit at the company's Woodstock Plant, on the last company offer presented in negotiations with the United Cement, Lime and Gypsum Workers International Union and its Local 368 (hereinafter referred to as "the International" and "Local 368", respectively). Pursuant to the direction of the Minister of Labour a vote was conducted under section 34e as requested and the results of the vote showed 58 ballots in favour of acceptance of the company's offer while 57 ballots were for rejection of the aforesaid offer. On October 17, 1980 representatives of CCL presented to L. King, President of Local 368 for execution a proposed collective agreement incorporating the offer as "ratified" by the section 34e vote. King refused both to accept and to sign the aforesaid document and advised CCL that the International and Local 368 would continue the strike. Indeed, Donald G. Burshaw, Vice-President of the International advised

King and Local 368 that they had no authority under the International's constitution and by-laws to sign any agreement with CCL without his concurrence (which was not forthcoming) and that if they did they could be subject to charges filed by the International's Executive Board. Unsurprisingly, picketing of the Woodstock Plant continued and the employees remain on strike.

3. Thereafter, CCL by letter dated October 18, 1980 requested its employees to report for work at 8:00 a.m. Tuesday, October 21, 1980 and, by letter dated October 23, 1980, acknowledged to them the confusion surrounding the situation but asked whether it made more sense to return to work and be paid while matters were being sorted out. The response achieved by these letters was the filing of the instant section 79 complaint by the International on October 21, 1980 asking for:

1. A declaration that CCL has violated *The Labour Relations Act*;
2. A direction that the Ministry supervised vote held on October 16, 1980 be set aside;
3. A direction that CCL cease and desist from:
 - (a) coercive surveillance of lawful picket line activity including the use of photography and tape recording;
 - (b) threats, both written and oral, that employees must resign from participating in a lawful strike and return to work;
 - (c) unlawful threats of plant closing;
4. A direction that CCL deliver to the homes of every member of the bargaining units at Woodstock and Bath a notice signed by the President of CCL advising employees of their statutory right to engage in lawful strike activity without unlawful employer interference;
5. Damages.

4. And in turn, CCL filed its section 79 complaint alleging violation of sections 14, 60, 63, 65 and 67 of *The Labour Relations Act* and requesting:

1. That the Board declare that the Respondents have violated *The Labour Relations Act*.
2. That the Board direct the Respondents to execute the Collective Agreement incorporating the Company's offer as ratified by the majority of the employees.
3. That the Board order the Respondents to cease and desist from all of the acts complained of.
4. That the Board declare that the return to work of employees is

neither grounds for expulsion from membership in the Union nor grounds for discharge by the Company.

5. That the Board order all employees to return to work.
6. That the Board order the Respondents, their officers, officials and agents, to cease and desist from any picketing or other interference with operations of the Company.
7. That the Board award damages to the Company for all losses or expenses incurred as a result of the Respondents actions since October 17th, 1980.
8. That the Board direct the Respondents to send copies of the Board's decision, letters of apology and letters committing the Respondent to future adherence to the provisions of *The Labour Relations Act* to all employees and post the same at the Respondents offices and the Respondents bulletin boards on the Company premises.

5. The additional facts surrounding these complaints are best grouped under the following headings: (a) history of collective bargaining between the parties; (b) CCL's stated reason for requesting the section 34e vote; (c) events immediately prior to the conduct of the section 34e vote; and (d) events immediately following the conduct of the aforesaid vote.

(a) *History of Collective Bargaining Between the Parties*

In addition to the Woodstock plant, CCL owns and operates a number of other facilities across Canada and at most of these locations the International together with one of its locals represent the hourly employees. Up until 1975 the following plants negotiated together under a master collective agreement system. These plants included Brookfield, Nova Scotia; Havelock, New Brunswick; St. Constant, Quebec (no longer represented by the International); Bath, Ontario; Winnipeg, Manitoba; Floral, Saskatchewan; Exshaw, Alberta; and Edmonton, Alberta. However, in 1975 these same plants negotiated in smaller groupings with Havelock, Woodstock, Hull and Brookfield constituting one such negotiating unit and this was so as late as the previous round of negotiations which culminated in the July 1, 1978 to June 30, 1980 collective agreement (known to the parties as "the mini-master"). In the current round of bargaining, the base of negotiations was reduced even further to basic plant by plant collective bargaining bringing the parties full circle to the position they were in during the early 1950's. It would appear that this fragmentation of bargaining has been at the insistence of the trade unions with CCL preferring the broadest base of negotiations possible. The dissatisfaction from the trade union side appears to have arisen out of a concern for the previous treatment of local issues.

The mini-master expired on June 30, 1980. Separate notices for

renewal negotiations were served by the International for each plant. Conciliation meetings were held in Woodstock for the Woodstock plant on the 7th and 8th of August. The Woodstock plant employs 121 bargaining unit employees. By letter dated August 19, 1980 the Minister of Labour advised the parties that he had decided not to appoint a Board of Conciliation for the Woodstock negotiations and a positive strike vote was conducted by Local 368 about this same time. A mediation meeting was held between the parties on September 17, 1980 under the auspices of the Minister of Labour. At this meeting CCL presented its final offer to the trade union negotiating committee and the offer was rejected by the committee without presentation to the membership for ratification or rejection. On Friday, September 19, 1980 no employees reported for work for the 7:00 a.m. and 8:00 a.m. shifts and a strike began. Supervisory staff have been working through the strike and providing around the clock security. Picketing has been peaceful. The status of negotiations at the other plants is relevant. Winnipeg struck on August 11 but by Labour Day the employees there voted to accept an offer similar to that made to the Woodstock plant. The Brookfield plant employees did not go on strike and have voted to accept this same offer. However, due to the intervention of the International Vice-President, the local trade union there has refused to sign a collective agreement and the employees continue to work under the previous terms and conditions of employment. Havelock, New Brunswick employees have also accepted the offer and the agreement was implemented on the signatures of the local union officials. The Exshaw, Edmonton and Bath employees went out on strike in September and they were continuing to strike.

None of CCL's competitors are experiencing strike activity and their employees are represented by the same trade union. The Board was advised that sales in the industry represent about 45% of its capacity and sales are declining. CCL occupies about 25 to 35% of the available Canadian market, but it lost 5% of its pre-existing market share during a strike in 1975. The current strike could therefore once again affect its market share and, thus, its plant utilization. We note that CCL has closed facilities at Port Colborne and Hull over the last few years but the reasons for these closures are not before us.

The way the trade union has structured itself is also relevant to the bargaining between the parties and helps to explain the International's position in this matter. Prior to 1954 the trade union dealt with the large multi-national companies in this industry in Canada and the United States on a plant by plant, local by local basis. It, however, discovered that these companies were able to play one plant off against the other to the overall disadvantage of the trade union. Therefore, in 1954 the delegates to the International Convention decided to adopt a more formal bargaining structure which was entitled and remains entitled "The International Bargaining Pro-

gram". It embraces Canada and the United States. The trade union is divided into ten districts, two of which are in Canada. Each district elects a district council consisting of rank and file members. Each district also elects a number of district representatives who become full-time staff representatives. There is, in addition, a number of International representatives appointed for Canada. Each district council establishes a district policy committee to which local trade unions send their bargaining proposals or resolutions. Where these resolutions are approved by the district policy committees in Canada, they are forwarded to the Canadian Bargaining Policy Committee established in 1974. The Canadian Policy Committee is chaired by the International Vice-President for Canada and its other members include a district representative from each of the two Canadian districts; the two district presidents; the two district secretary-treasurers; and the vice-president of one of the district councils on an alternating basis. The Canadian Bargaining Policy Committee meets on the resolutions submitted to it and formulates the bargaining program for that year. For the current round of bargaining, the Canadian Bargaining Policy Committee met in the second week of February. It is important to note that resolutions are sent from all locals of the trade union including locals representing the employees of other companies and some of these companies operate in other industries. It is understood that the policy which emanates from the Committee is desirable but not always achievable. The International Vice-President then met with representatives of all CCL local trade unions on March 3rd, 4th and 5th, 1980. From these sessions, he assembled an entirely new document to be proposed to CCL. The decision to seek an entirely new collective agreement stemmed from an alleged failure of CCL to honour many past practices not specifically incorporated into the existing collective agreement and increased contracting out. The proposed collective agreement also sought changes in the areas of temporary transfers, scheduling, and requested the exclusive reliance on seniority in job postings together with the right to negotiate job content.

Rule 19 of a union document entitled "Rules and Procedures To Govern Canadian Bargaining Policy Committee" provides:

Upon reaching a tentative agreement with the employer, such agreement must first be approved by an official representative of the International Union. This representative to be the Canadian International Vice President who is also chairman of the Canadian Bargaining Committee.

Upon receiving approval of the Canadian International Vice President, then the question of local union approval must be submitted to a regular or specially-called meeting of the local union. Such approval of the agreement must be by majority vote by secret

ballot of the members employed by such employer attending such regular or special meeting.

The above steps in approving the agreement are in conformity with Article 18, Section 3 of the Constitution and By-Laws of the International Union.

Sections 3 and 4 of Article 18 of the Constitution and By-Laws of the International provides:

Section 3 – Authority to Negotiate

Neither a local union nor the bargaining committee thereof shall have authority to modify, change, agree to or sign a collective bargaining contract with any employer without first obtaining the approval of the International Vice-President and a majority of the members employed by such employer attending a regular or specially-called meeting. Should any local union fail to comply with the foregoing, the International Executive Board shall have the authority to discipline said local union in any manner it may deem feasible. After full approval, as aforesaid, such contract shall be binding upon all members of the local union. Copies of all understandings, memorandums, contracts, agreements and wage scales must be mailed by the local union to the International Vice-President, and the International Vice-President shall supply official copies of all such documents to the General Office of the International Union.

Section 4 – Uniform Agreements

It shall be the established policy of the International Union in dealing with employers having more than one (1) plant that all local unions whose members are employed by the same employer shall always act in unison in developing and concluding collective bargaining negotiations. It shall be a violation of this Constitution and By-Laws for any such local union, acting alone or in concert with another such local or locals, to take any unauthorized action involving the development or conclusion of collective bargaining negotiations. Such local unions shall endeavor to the best of their ability to establish working conditions and all other employment conditions as uniformly as possible. However, all such activities shall be carried on under the full supervision of the International Union and the respective district councils.

It is clear that the International Vice President has conducted himself on the basis of these provisions in responding to the last offer vote which is the subject matter of this case.

(b) *CCL's Stated Reasons For Requesting the Section 34e Vote*
Local 368 had conducted a strike vote in August on the basis of the

company's offer as of that time. On September 17, 1980 CCL's final offer was materially different and better. The August offer amounted to a 34% increase over a three year contract. The September offer increased this to 42% – an offer which constituted an 8% to 10% increase for bargaining unit employees depending on their base rate. The principal changes involved a 30 cent per hour increase instead of the August offer of 20 cents; the immediate folding in of \$1.26 of the COLA; a dental plan in the third year; and a fully integrated COLA annually. Not only did the company learn that this revised offer was not submitted to the membership in a ratification vote, it knew of at least two employee petitions that were circulated on behalf of employees who wanted the chance to vote on the September offer. The International Vice-President knew of one petition and admitted that it was never acted upon by the trade union. It was also the company's evidence that a number of bargaining unit employees let CCL representatives know they wished such a vote. A final reason for requesting the Minister to conduct a vote arose out of CCL's concern that the employees thought the offer had been rejected in Winnipeg. Just after the commencement of the strike a news report appeared in a local newspaper quoting a union official as saying the offer was identical to one turned down by CCL employees at its Winnipeg plant. In fact, the offer had been accepted by the Winnipeg employees.

(c) *Events Immediately Prior to the Section 34e Vote*

The Minister of Labour appointed the Registrar of the Ontario Labour Relations Board to conduct the requested vote. On Tuesday, October 7, 1980 he convened a meeting between the parties to discuss the voting arrangements. At this meeting, CCL representatives proposed that the last offer submitted to the employees should include all items already (tentatively) agreed to between the parties together with its offer of September 17 on all outstanding matters. Mr. Burshaw objected to this proposal. He took a more literal view of what was required and requested that only the September 17th offer (in its entirety) be put to the employees. The Registrar acceded to his request. CCL representatives also asked about any restrictions on the communication of pre-vote information and propaganda to which the Registrar responded that no such rules had been promulgated. He apparently indicated that no such restrictions pertained even on the day of the vote and immediately outside the polling station. When presented to the union in September, the CCL last offer had an attachment styled "Memorandum of Agreement" which provided:

The Company agrees to provide to the Employees at the Woodstock Plant the same compensation (monetary) increased as is negotiated at any of its plants currently under negotiations (excepting local issues) and such compensation

changes shall be made retroactive to 1 July 1980. Also, all negotiated wage increases and benefits (excepting insurance modifications) shall be retroactive to 1 July 1980.

The above is contingent on the Woodstock negotiating committee, Local 368 recommending acceptance to their membership of the enclosed Company offer.

At the meeting with the Registrar, CCL representatives offered to delete the last sentence to avoid any confusion over its relevance in the context of a directed vote but the trade union representatives objected and the Registrar decided that the sentence was to remain. By letter dated October 10, 1980 the parties were advised of the vote arrangements. The vote was to be held on Thursday, October 16, 1980 at Room No. 1 of the YMCA in Woodstock. The last paragraph of the Registrar's letter provided, in part:

"... The poll will be open from 2:00 p.m. to 6:00 p.m. The ballots will be counted immediately after the closing of the poll in the presence of officers of your local union and of your employer. The vote itself will be conducted under the supervision of a Returning Officer appointed by me from the staff of the Ontario Labour Relations Board. The Returning Officer is the person to whom any inquiry with respect to the voting procedure should be directed."

It is apparent from the evidence that at no time prior to the holding of the vote did the representatives of the trade union express the view to CCL representatives that they did not believe a vote accepting the last offer under section 34e bound them to execute a collective agreement on that basis. On the other hand, it is clear from all CCL communications to its employees prior to the vote and from its press releases that it believed a favourable vote would end the strike. Before a vote had even been requested by CCL, it wrote to its employees in a three page letter dated September 19, 1980 explaining the details of its September 17, 1980 offer which the trade union had rejected. A press release of October 3, 1980 explains CCL's wish that "our Woodstock Plant workers must be provided with an opportunity to vote on the latest Company offer". A further letter of October 14, 1980 was hand delivered to each employee and explained in summary form the details of the offer to be voted on. This explanation included items which had been tentatively agreed to together with the offer of September 17. The last paragraph of the letter explained this combination of items in the following terms:

You will note that some of the terms on the attached page are not included in the document distributed to you by the Ministry of Labour. That document is identical to the one presented to the negotiating committee at the mediation

meeting on 17 September. The attached page summarizes that languages changes on which tentative agreement had been reached during previous negotiating meetings.

An advertisement, again reporting the details of its offer, was placed in the London Free Press on Wednesday, October 15, 1980 by CCL. This ad notes that "Canada Cement Lafarge Ltd. workers in Winnipeg, Manitoba; Havelock, New Brunswick; and Brookfield, Nova Scotia, representing 50% of our clinker producing plants currently involved in these negotiations, have retified this contract offer." However, the most controversial communication was by CCL's President, J. D. Redfern who held "last minute" press conferences in Woodstock at 10:00 a.m. and at Belleville (Bath) at 6:00 p.m. on Wednesday, October 15, 1980. The text for each conference was identical save for the substitution of certain data relevant to the particular location and for the last paragraph. Presumably, the Bath plant local was addressed because it is CCL's intention to request a vote of the employees employed at that plant in the immediate future. Key portions of the Woodstock text included:

- 3) ... Unfortunately, once a strike starts, these groups have very little ability to stop it. *Current Legislation puts power into the hands of the one group that loses least – the union executive!*

They continue to be paid as they go about deciding what is good for their future and organization, and act accordingly. It is no accident for example that that same union involved here is currently negotiating with other cement producers in Canada without any of these plants being on strike. For *union reasons* it suits their purposes to strike CCL the only national company. The fact that our employees continue to suffer, and our communities continue to pay the price, is of little consequence to their selfish plans. It is like playing poker where everybody but one player has to use his own money. Without anything to risk he can continue to play in the most irresponsible manner.

Let us see if this pattern or scenario is similar to our specific problem here today.

- 4) Normally this would be a routine work day and some 168 employees would be involved with the operation of the CCL plant at Woodstock, Ontario. However, not normal is today's picket line (representing an international union headquartered in Chicago) whose aim is to persuade all who are involved, not to work. As a result, this plant, at today's replacement cost of some \$70,000,000 sits idle.
- 5) By itself this would represent a loss to many, but here in

Ontario it is compounded by the fact that even without this strike, the cement industry is under-utilized (domestic market equal to about $\frac{1}{2}$ of the existing capacity) and the market has been dropping at an average rate of 5% per year since 1974. Given this scenario, it is not surprising that the selling price of cement in Ontario is one of the lowest in North America....

- 8) As discussed previously, it could be that the union's strategy, and not the employees' personal well being is being satisfied here. Or, those on the picket line, not completely advised by their union of the details of the contract offer, are acting without all the facts. Again, employee indifference or group pressure tactics may be stifling the wish or the majority.

- 9) If this plant remains closed, what is the impact on those involved?

For the immediate community it means the interruption of an annual payroll of \$3,750,000 and purchases of \$2,700,000 in goods and services.

In the Province of Ontario purchase of power \$1,480,000 and fuel \$3,850,000 is affected.

For Woodstock the potential production of 1,400 tonnes of cement per day is halted. (All truck and rail shipments are curtailed). Exports to the U.S. that are needed to help offset low domestic demand and to assist Canada's foreign exchange are lost. In 1979 nearly \$14 million of cement went from our Bath plant to U.S. customers, allowing a higher percentage of Ontario sales to be manufactured in Woodstock.

To the investor (pensioner, insurance owner or stock buyer), the potential return hoped for is being eroded. For Canada in need of enormous investment to utilize its potential in the 80's this type of difficulty turns people to saving and no-risk bonds rather than the investment outlet. (Let's look at CCL investors position).

The big loser is, of course, the individual worker and family. He or she loses three ways: (1) an hour's pay lost for each hour on strike; (2) rather than year-round employment, lay-offs become a sad fact due to loss of market to competitors not on strike; (3) due to loss of earnings, the company is not able to reinvest to stay competitive, thus plants grow old and are closed with workers laid off in mid-career. This plant is only here today because previous profits and investor confidence provided the capital needed.

- 10) How do we solve this problem? Under our conditions and the

attractiveness of the offer, the fact that we have been unable to find a workable, efficient solution to what should have been an easy problem, reflects badly on Canadian labour relations and our current system and rules. From the workers' viewpoint, this strike is uncalled for and is a complete denial of their expectations that the union dues they are paying are to improve their conditions of work and compensation. Instead, they are paying the price while the union executives manipulate the system for their own goals. From any logical point of view, the union should be celebrating the offer of a very good contract without cost to their membership, instead of leading them into hard times through a strike.

- 11) Our position is clear. As we are satisfied that a fair and attractive offer has been made, we have 3 alternates:
 1. Run the plants with the assistance of our unionized employees (working as a team).
 2. Run the plants with supervisory personnel within the limits permitted by law.
 3. If unable to operate, close down completely to reduce overhead until the dispute is settled.

Only in this way can the amount of harm being inflicted on the public, our shareholders, our customers and our employees be minimized. We owe it to all our employees who average many years in our employ, to preserve as best we can the fiscal stability of their company such that when the strike is over, we have jobs and suitable compensation for them to return to.

- 12) For the benefit of the employees, the law of Ontario allows the province to conduct a supervised ballot on the last contract offer. The Ontario Government will be conducting such a vote on October 16th for the benefits of the employees of the Woodstock Plant. (A similar vote will be held in the near future at our Bath Plant.) They are on strike, despite the fact that the Union did not wish them to vote on the offer previously described. This is not surprising, as the union has tried to prevent other locals across the country from accepting this same offer. Despite this opposition to settlement by the union, plants in Manitoba, New Brunswick and Nova Scotia have voted to accept this contract and, in fact, are presently at work. The extent that the union is working against the members wishes can be illustrated by the fact that at one plant where the members voted to accept the contract by a vote of 77-2, the union executive attempted to keep them from signing.

We would appreciate your help in making the facts known to all. We are confident that our actions will prove to be in the best interests of our employees and the public. Your coverage of this press conference will make a positive contribution towards informing our workers and the public about the latest developments in the present situation.

A positive vote could signal the return to work of the employees involved immediately. *A negative vote could, at best, see this plant closed for months, at worst, closed forever.* [emphasis added to last sentence by Board]

The salient difference in the Belleville text was the last paragraph of paragraph 12) which reads:

A positive vote could signal the return to work of the employees involved immediately. A negative vote could, at best, see this plant closed for many months and reduced in its period of employment for many years to come, due to the loss of Canadian and export markets to competitors not on strike.

Press coverage of these two conferences reported in newspapers in London, Woodstock, Belleville and Kingston on October 15 and 16, 1980 carried such headlines as "Firm threatens to fold if contract rejected" (London, October 16); "President offers local workers an alternative" (Woodstock, October 15, 1980); "Company may close plant if strike not settled" (Belleville, October 16, 1980); and "Canada Cement takes 'last step' to end strike" (Kingston, October 16, 1980). However, the text of each article carries a fairly accurate report of the purport of Mr. Redfern's remarks and even the London newspaper report of October 16, 1980 elaborates the headline and makes mention of market conditions. Other newspaper reports in and around October 9 to 11, 1980 contain statements said to have been made by Mr. Burshaw advising that the offer had been turned down by employees in Winnipeg and characterizing the legislation requiring the vote as "unfair", "horrible", and an infringement "on our rights, on our bargaining goals". Mr. Burshaw denied stating that the Winnipeg employees had turned the offer down.

The Board was advised that the vote was conducted as scheduled. CCL officials sat in their car in a parking lot near the polling station. They observed a number of union officials at the polling location during the period of the vote. They also observed at least one information picket and the circulation of a leaflet.

The report of the returning officer reveals that 115 persons cast ballots. 58 marked ballots in favour of acceptance of the final offer. 57 marked ballots for rejection of the offer. Neither party objected

to the conduct of the vote and the trade union did not take exception to the company's earlier conduct before the vote was counted. Accordingly, the ballots were immediately counted with officials from both sides in attendance.

(d) *Events Immediately Following the Vote*

Soon after the counting of the ballots Mr. King, President of Local 368, advised CCL representatives that the union's lawyers would be preparing an intervention. He also said that the offer submitted to the employees was not really an offer because the negotiating committee had not recommended it to the membership as required by the attached memorandum of agreement. He expressed concern about the press conference and the earlier press releases of the company. And he may also have said that the execution of an agreement on the basis of the vote was contrary to the trade union's constitution. On Friday, October 17 at approximately 7:55 p.m. CCL officials presented Mr. King with a proposed collective agreement based on the vote for signature. He refused either to accept or to sign the document. He said that all the company had achieved "was to split the union right down the middle". He stated "that at least 57 employees were still on strike and on the picket line". He said that he had been advised by the union's lawyers that the Labour Board would not order them back to work. It was also stated that the execution of the agreement by Local 368 would be contrary to the union's constitution which required the International Vice-President's approval. Thereafter, CCL sent a telex to King indicating that it would have to take steps to bring about the completion of the agreement and that the company "[was] holding the union liable for any losses or damages incurred by [it] due to the continuation of the strike."

CCL sent the following letters to its employees:

October 18, 1980

Dear

Following approval of the new collective agreement by a majority of the hourly employees, the company will resume operation of the Woodstock plant at 8:00 a.m. Tuesday 21 October, 1980.

You and all other employees are requested to report for work at 8:00 a.m. Tuesday 21 October, 1980.

If you are unable to return at that time, you are required to advise the plant within five (5) days of receiving this letter of your intention to return to work. In addition, you must return to work within two (2) weeks from the date of receiving this notification.

I look forward to seeing you back again and I will appreciate you help in returning the plant to normal operation.

October 23, 1980

Dear

On Thursday, October 16, most employees voted by secret ballot on the final company offer. The result was 58 to 57 in favour of acceptance, but the strike continues.

We appreciate the confusion arising from two conflicting stories, one from the union executive, and from the company. Doesn't it make more sense to return to work and be paid while the confusion is sorted out?

The Union is quoted in the Press as having threatened anyone who crosses the picket line with expulsion and loss of his job. This is unlawful under *The Labour Relations Act*.

1 - CCL Option

Return to work and get paid an average of \$85.00 per pay. The Company offer is as stated and we guarantee that the Company will stand behind it.

2 - Union Option

Stay on strike and collect strike pay.

Canada Cement Lafarge has made an offer. The majority has accepted it. Let's get back to work. You have everything to gain.

The October 18th letter was modelled on the recall provision of the preceding collective agreement between the parties. However, CCL made no decision about what action to take against employees who failed to accede to the company's request and has, to this date, made no such decision.

CCL suspected that some employees would not return to work and was concerned for the safety of anyone who tried. Therefore, in order to deter any incident and to safeguard the passage of all persons into the plant, the services of a security firm were retained. A CCL witness also advised the Board that the Ontario Provincial Police had been reluctant to play any prominent role. On Tuesday, October 21, 1980 a large number of pickets congregated about the entrances to the plant from 6.30 a.m. onward. By 8:00 a.m. their numbers had swelled to sixty or seventy people. A company witness testified that some of the employees were picketing while others were simply waiting around their cars. Salaried and supervisory staff entered the plant without incident but no hourly employees reported to work. This situation prevails although the company continues to ship a very reduced quantity of product through the efforts of its supervisory staff. The Board was advised that cameras have been used by the security forces when staff or trucks are entering or leaving the plant "to deter any

improper actions” on the picket line. Some twenty-five security staff have been involved in the effort to date. Apparently, a helicopter has been recently used to transport staff into the Bath plant in order to avoid picket line incidents and because of a CCL perception that employees are potentially more militant at that location.

Submissions of the Parties

6. It was the position of CCL that section 34e clearly overrides the trade union’s constitution and that a vote in favour of acceptance either immediately resulted in a collective agreement or obligated union representatives to execute such an agreement. Counsel relied on the explicit wording of the section and its relationship to other provisions such as sections 34d, 34c and 34b. It was submitted that the trade union’s refusal to execute the collective agreement submitted to it on October 17, 1980 constituted a violation of its bargaining duty under section 14 and the Board was requested to direct the trade union to execute the document as submitted. The Board was referred to *Municipality of Casimer, Jennings and Appleby*, [1978] OLRB Rep. June 507 in support of this request. Counsel further submitted that, in refusing to sign the collective agreement and in continuing to support the strike, the trade union was also in breach of sections 60, 61, 64, 65, 67 and 69. He therefore reiterated his request for all of the relief reproduced at the outset of this decision. In defence of the trade union’s allegations, counsel submitted that the Board should be reluctant to play the role of “censor” in monitoring pre-vote communications or propaganda emanating from either party. In this respect we were referred to *Noranda Metals Industries Limited*, [1975] 1 Can LRBR 145 (BCLRB). In the alternative, it was submitted that none of CCL’s communications violated the statute or any reasonable standard of voting conduct in the circumstances. It was further argued that the use of external security services only commenced when there was a *bonafides* concern for the safety of employees and equipment after the holding of the vote.

7. On behalf of the trade union it was submitted that a vote under section 34e in favour of accepting an employer’s last offer does not, in itself, produce a collective agreement. Counsel argued that there was no express provision to this effect and the Board should hesitate before directing this result given the impact of such holding on the legal status of a trade union to conduct collective bargaining. It was thoughtfully submitted that section 34e’s primary role was to provide information to the parties about the wishes of the employees and that this information could produce useful pressures for settlement. Counsel admitted that a 34e vote could be relevant to the trade union duty under section 14 but that the Board should also take into account a) the structure of bargaining; b) the trade union’s constitution; c) its bargaining goals; and d) all other relevant facts including the pre-vote conduct of the employer. It was submitted that where two reasonable interpretations of section 34e are open to the Board, it should prefer the one more closely following the scheme of the Act and bearing a greater affinity to the principle of voluntarism. Counsel contended that CCL had no standing to raise section 60 and that CCL’s threats to close the Woodstock plant, whether accurately reported by the press or not, were sufficient cause for the trade union to ignore the results of the representation vote. Counsel therefore asked that CCL’s complaint be dismissed and that the union be accorded the relief it sought which is set out above.

Decision

8. Again, section 34e provides:

(1) Before or after the commencement of a strike or lock-out, the employer of the employees in the affected bargaining unit may request that a vote of such employee be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties and the Minister shall, and in the construction industry the Minister may, on such terms as he considers necessary direct that a vote of such employees to accept or reject the offer be held and thereafter no further such request shall be made.

(2) A request for the taking of a vote, or the holding of a vote, under subsection 1 does not abridge or extend any time limits or periods provided for in this Act.

We are satisfied that this section is not simply a method by which an employer can sample employee opinion with no legal effect on the trade union. It is our view that the wording of the section makes it abundantly clear that a vote in favour of accepting a last offer creates, in the usual case, the basis upon which a binding agreement between the employer and trade union is to be entered into. When the effect of the vote has been properly recorded in the form of a collective agreement, the officials of the trade union are obligated to execute the document. The failure to execute the agreement may constitute a violation of section 14 which can be remedied by the Board on the filing of a complaint under section 79 of the Act. However, we emphasize the qualification "in the usual case" because there may be circumstances where a trade union would be justified in refusing to submit to the results of a vote. For example, if a vote has been influenced by improper or illegal conduct of an employer, it would be patently silly to conclude that the trade union is violating section 14 by continuing to negotiate and refusing to submit to an outcome that does not represent the true wishes of the employees in the affected bargaining unit. Or a last offer may appeal to the majority of bargaining unit employees and, yet, be in blatant violation of the trade union's duty under section 60 because of the invidious treatment of a minority of employees.

9. A similar but much more difficult situation may arise where the outcome of the vote has been clearly influenced by the segregated ballots cast by a large number of strike replacement employees. If the vast majority of the employees in the bargaining unit who are employed at the commencement of the strike have, however, voted to reject the last offer and to continue their strike, it would be counter-intuitive, in an industrial relations sense, to conclude that the trade union is automatically bound by the wishes of employees it does not really represent. Indeed, the employer's offer in such circumstances might even contain terms which are very damaging to the trade union as an entity, i.e. See *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136 where an employer's offer contained a demand that the trade union compensate it for losses sustained during a strike. Whether the trade union is obligated to submit to the balloting in these kinds of situations may well depend on the duration of the strike at the time of the vote and other important industrial relations facts. Quite different approaches may also be needed where the employer and trade union have agreed at the outset of negotiations to multi-plant negotiations or other format conditions of bargaining. All of the above, therefore, are useful examples by which to illustrate that a collective agreement need not automatically follow an affirmative vote in a bargaining unit to accept an offer and that section 14 must be applied in light of accepted principles of collective bargaining. As will be elaborated below, the section is intended to end industrial conflict and cannot be used as a

vehicle to achieve some destructive aim wholly inconsistent with the overriding purposes of the statute.

10. Our reasoning for rejecting the “opinion theory” of section 34e proposed by the trade union required some explanation. To begin with, we note that the section uses words that, in usual usage, have legal significance. “Acceptance”, “rejection” and “offer” are words or concepts typically used in determining and describing whether or not a binding commitment between parties has been arrived at. Had the Legislature wanted to create only an informational device, it would surely have avoided the use of such “loaded” terminology. There would have been much less reason to allow only one “last offer” vote. In any set of negotiations an employer may have to make numerous additional proposals after what it initially thought was its last offer in order to settle a strike. Why would opinion testing be limited to one last offer? Similarly, there would have been less reason to insert subsection 2 stipulating that the holding of a vote does not abridge or extend any time limits or periods provided for in the Act if only opinions were being sampled under section 34e. Opinion testing could have no possible effect on the course of bargaining as provided for by sections 63 and 70. Bargaining would simply proceed apace with the trade union completely in control, section 34e only representing a source of information that might be acted on at the trade union’s discretion. The same kind of question can be asked about the decision to exempt the construction industry from the mandatory feature of the provision. Why the exemption if the section was intended only as an opinion poll? We would also draw attention to the very similar wording found in section 34d, a section that preceded the amendment under consideration in the instant case. The principal difference, of course, is that section 34d can be employed only on the insistence of the Minister. However, had this same question arisen under section 34d, it would have been doubly difficult for this Board to have held that the selective yet penetrating intervention of the Minister under section 34d constituted no more than an “opinion poll” despite a majority having voted in favour of acceptance and recognizing that failure to treat the results as binding might only divide the union and entrench the impasse.

11. In our view, the section is designed to reduce industrial conflict in at least two ways. If a bargaining representative is not accurately reflecting the wishes of the represented employees, the impasse is not justified and a vote to accept the employer’s last offer ends further unnecessary conflict. On the other hand, if the employer is reluctant to alter his position because he erroneously believes the bargaining agent to be out of touch with its constituency, a vote to reject the last offer will convey that real movement is required to overcome the bargaining impasse. Hopefully, employers will react to this latter purpose, instead of “digging in” for a longer strike. While not specifically dealing with the legal effect of section 34e, the Board passed on this “reduction of conflict” purpose in the recent *Wilson Automotive (Belleville) Ltd.* case, [1980] OLRB Rep. Sept. 1337 at para. 11-14, pp. 1340-41:

11. In the Board’s view the intention of this section of the Act is plain. Industrial conflict is costly to employers, employees and the community as a whole. It is therefore desirable that unnecessary industrial conflict be minimized, whether it be in the form of a potential or actual strike. An employer is duty-bound to bargain exclusively with the union that has the bargaining rights for its employees. While it has a certain freedom of speech, it cannot bargain directly with its employees. It can bargain only with their union. A failure to do so is a breach of the duty to bargain in good faith. (*Radio Shack*, [1979] OLRB Rep. Dec. 1220 at 1241-47; *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393 at 398-99.)

12. Through the bargaining process both the union and employer seek to maximize their own self interest. In doing so they frame their demands and offers in terms of their own reading of what the union membership will, in the end, accept. At some point in bargaining the company offers what it thinks the employees will accept. At that point the union may take the position that the employees require more, or that the union can obtain more for them. The result can be a stalemate which, during a strike, may be costly. Before the enactment of section 34e of the Act the union's bargaining committee might have rejected an offer from the employer that the employer was convinced would be accepted by the employees if only it could be put to them. But the employer could not require that its offer be put to a vote of the without the concurrence of the union. There was, in other words, no measure short of prolonged industrial conflict to resolve the stalemate that developed. Section 34e of the Act responds to that problem. It provides the supervised vote as a mechanism of public policy to move the dispute off centre.

13. A union's tradition control over when to take an offer back to the membership is a significant part of the balance of power in collective bargaining. The employer derives a certain leverage from its ability to play its cards as it chooses, making successive offers in the time and amounts that maximize its interests. The union bargaining committee has countervailing leverage in its ability to reject an offer of the employer and to insist that something better be served up before an offer is put to the employees for their acceptance.

14. Section 34e introduces a safety valve into that traditional tension in bargaining. It gives the employer the right at any time during bargaining to call for a vote of the employees on its last offer in respect of all matters in dispute. This the employer may do once, and only once. The reason for that is obvious. It is with the union exclusively, and not with the employees that the employer must bargain. To allow the employer the right to call for repeated votes of the employees would entrench substantially on the union's rights to be the exclusive bargaining agent of all of the employees. In practical terms, repeated votes would work a shift in the balance of power in bargaining by eliminating the tactical leverage of the union's bargaining committee and allowing the employer to bargain directly with the employees by an ongoing referendum. By giving the employer the right to call for a vote of the employees only once, the Legislature has balanced two legitimate interests in collective bargaining. It has given the employer an instrument to identify and eliminate unnecessary industrial conflict while preserving as far as possible the fundamental interests of the union to remain the body with which the employer must bargain exclusively. The ability of the employer to reach over the trade union to the employees is, therefore a very limited right.

12. Counsel for the trade union characterized section 34e as a form of factfinding, but in our view, this analogy is unsound. Factfinding, in all of its forms to date, has involved an assessment of a dispute by a third party and a factfinder's report may bring *external* settlement

pressures to bear on one or the other party or both. See Downie, *Collective Bargaining and Conflict Resolution in Education: The Evolution of Public Policy*, Industrial Relations Centre, Publication No. 36, Queen's University at Kingston (1978) at pp. 109-116. It does not pit one employee against another or one group of employees against the trade union and its officials as an *internal* representation vote does. For this reason, we are satisfied that the Legislature intended to end the bargaining dispute and its related conflict where a majority has freely and properly voted to accept the employer's last offer. To permit the trade union (and the minority of bargaining unit employees) to ignore the wishes of the majority registered under section 34e would only exacerbate matters by creating turmoil inside the trade union. Indeed, this case is a good example with the International Vice-President threatening the majority of bargaining unit employees at four plants with charges under the union's constitution. In those jurisdictions where the previously held ratification vote lacked the authority of a section equivalent to section 34e, the locals and employees remain subject to intense yet conflicting pressures and loyalties. While our interpretation of section 34e leaves some room for this potential where a vote is in favour of rejection, the union's interpretation would have this be the case in all votes regardless of the outcome. Furthermore, it is dramatically more divisive to ignore the identified wishes of a majority. The honouring of a majority vote in favour of rejection has nowhere near the potential for generating hard feelings within a trade union because a minority generally expect to be guided by the wishes of the majority. The opposite is clearly not true.

13. But with all this talk of "majority" and "minority", it is important to emphasize that section 34e does not itself stipulate that the outcome of a vote is that option attracting "more than 50 percent of the ballots cast" as does, for example, section 7(4). In the facts at hand we are prepared to define the outcome in this way because the Minister did not direct otherwise and because there is no industrial relations consideration in this case which would support a definition of the outcome in terms other than a simple majority. In fact, although the International's constitution speaks only in terms of members instead of employees, it too requires a simple majority to ratify a collective agreement. See Article 18, section 3 and see section 63(4a) of *The Labour Relations Act*.

14. For all of these reasons, we cannot find that the Board is confronted with two equally plausible or reasonable interpretations enabling us to choose the union's theory as being more consistent with the scheme of the Act and the legal authority of a certified bargaining agent. In this sense *Bradburn v. Wentworth Arms Hotel Ltd.* (1979), 79 CLLC ¶ 14,189 does not provide the guidance the trade union argued it did. The section, to the extent that it permits an employer to cause the equivalent of a ratification vote against the wishes of the trade union, is an exception to the exclusive authority of the trade union. This is why such access is so narrowly defined. An employer has a right to put his last offer before the employees in the bargaining unit for acceptance or rejection only once. And as any thoughtful practitioner of labour relations knows, it is a right to be exercised with extreme caution. It is not the norm for a negotiating committee to be so far out of tune with the persons it represents that its recommendation against an employer's offer will be ignored. On the other hand, an employer's belief that a committee or trade union representative is out of step with employee wishes may be, and often is, based on unreliable sources (i.e. persons telling the employer what they think he wants to hear). Moreover, a vote to reject what the employer has characterized as his "last offer" can serve to deepen the impasse unless the same employer is prepared to quickly change that offer and run the risk of impairing his credibility in future rounds of bargaining. But hopefully, the mere existence of the provision may encourage trade unions and their

representatives to employ last offer votes on their own initiative. If the amendment has this effect, it is likely to rectify the "mischief" it was intended to cure and without the kind of controversy that seems to have been generated in this case.

15. This then brings us to CCL's section 14 complaint and a consideration of whether the trade union (International and Local 368) was justified in refusing to execute the tendered collective agreement. What ought the Board's role be in disputes of this kind and, more particularly, what standard of review ought to be applied to pre-vote communications and propaganda, if any? We must also inquire whether the trade union's constitution and the related refusal of approval by the International Vice-President constitute a justification for the trade union's refusal to submit to the outcome of the section 34e vote. Turning to the first issue, CCL's counsel submitted that a "hands-off" policy was the appropriate posture for the Board to take or, at most, the Board's involvement should be limited to obviously unlawful acts or communications. Counsel for the trade union, on the other hand, submitted that the standard of review ought to be as rigorous as that applied in representation elections. It was his submission that, for older employer with substantial years of service, a threatened plant closing can be every bit as coercive as the kind of conduct that is often censured by this Board in the context of organizing campaigns and representation votes.

16. We are of the view that the Board ought to adopt a position drawing from both of these submissions and that our jurisdiction to do so flows from sections 14 and 79 of *The Labour Relations Act*. The event of a last offer vote has legal significance to both parties in light of their respective rights and duties under section 14. Such a vote occurs in the context of collective bargaining negotiations and, thus, falls under the Board's general regulatory provisions pertaining to the negotiation process. Presumably, no more specific enforcement provision was thought necessary or wise because of the great variety of situations possible and because of the inevitable inter-relationship of section 14 in all such cases. Section 14 provides:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

This section, therefore, constitutes an important vehicle for regulating the conduct of the parties in the context of a section 34e vote as it has assisted in related situations. See *Municipality of Casimer, Jennings, and Appleby, supra*; *Noranda Metals Industries, supra*. We would also observe that the Minister could, in his direction, stipulate certain ground rules for a section 34e vote and rules such as a 48 or 72 hour "silent period" before the vote might well be useful. But clearly, in the absence of Ministerial guidance, this Board cannot take the position that no standard of review is proper. Pre-vote conduct or communications involving coercion, intimidation, threats, or undue influence can undermine the reliability of a directed vote and cannot be tolerated or have been intended. To require the trade union to execute a collective agreement where an employer has engaged in such conduct would simply contribute to the illegality and reward the wrongdoer. On the other hand, the collective bargaining process is at times highly charged with emotion and centres on economic conflict or the threat thereof. In many situations, the very survival of the parties can be at stake and in all instances it embraces an admixture of pressure and persuasion. The complex role of tactic in bargaining through the use of threats, persuasion and public commitment lies at the centre of the bargaining process. See Schelling, *The Strategy of Conflict* (1960); Walton and McKersie, *A Behavioural Theory*

of *Labour Negotiations* (1965); Stevens, *Strategy and Collective Bargaining Negotiations* (1963); Brown, *Interest Arbitration*, Study No. 18, Task Force on Labour Relations (1970); Sanderson, *The Art of Collective Bargaining*, (1979).

17. When a trade union advises an employer that unless the trade union's final proposal is accepted a lengthy and costly strike is possible, it is threatening to impose economic costs on the employer in order to achieve a collective agreement. It is the threat of economic harm to *both* sides which lies at the centre of collective bargaining encouraging the parties to come to agreement and to avoid such costs. Long strikes have the immediate and short-term effect of decreasing or eliminating the income generated to all parties. Such strikes can also, however, have a long-term impact on both parties if customers go elsewhere to service and do not return or return in lesser numbers on the resumption of work. See *Webster & Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 780. Parties to collective bargaining constantly remind each other and their respective constituencies of this reality and often do so in ways that attempt to achieve a tactical advantage. See generally Walton and McKersie, *supra*; and Stevens, *supra*. Similarly, both trade unions and employers often take public positions on various matters. If these positions are not achieved in bargaining great embarrassment and internal costs may ensue. A public commitment may thereby increase the cost of failure for the party making the public statement and at the same time increase its resolve to achieve the stated goals. The opponent will realize this fact and have to take it into account in fashioning its position.

18. A good illustration of public commitment can be found in the International's own publication "The Voice" where the August 1980 edition describes Mr. Burshaw's position in bargaining with CCL in these terms:

Strike against CCL begins

WINNIPEG, MAN. – Thirty-two negotiation meetings, which CLGW Canadian Vice-Pres. Donald G. Burshaw characterized as "terrible," have led to a strike by Local 274 at nearby Fort Whyte against Canada Cement Lafarge Ltd. Local 274 walked out Aug. 11.

"This will be a national strike," Burshaw said, noting that seven other CCL locals are just waiting for the required time limits under their provincial laws to walk out as well. Over 900 workers are involved.

"All locals are solid," he said. The other involved are Local 219, Bath, Ont.; Local 324, Havelock N.B.; Local 331, Exshaw, Alta.; Local 368, Woodstock, Ont.; Local 369, Edmonton, Alta.; Local 454, Brookfield, N.S.; and Local 564, Saskatoon, Sask.

Conciliation meetings are continuing, Burshaw said at Voice deadline. "I'm ready to meet at any time," he emphasized.

The prime issue in the bargaining impasse, Burshaw told the Voice, is that of integration of COLA, the cost-of-living adjustment. "We now have just a float," he said about the CCL COLA. This means that COLA is paid only on eight hours a day, 40 hours a week. An integrated COLA is also paid on vacations, overtime, holidays, and pensions. Among the

Canadian locals having an integrated COLA in current contracts are Local 366, St. Lawrence Cement; Local 387, Lake Ontario Cement; Local 215, Canada Cement Lafarge in Montreal East; and former Local 470, St. Constant Cement, which has had integrated COLA since 1975.

Other issues in the stalled negotiations, Burshaw said, are:

- An improved contracting-out clause. "We have gone through two bad years of grievances over contracting work out," Burshaw said.

- A right to negotiate changes in job content.

- A job-transfer clause. "We must have this clause, which is in the entire U.S. cement industry, including Citadel Cement, which is owned by Canada Cement Lafarge."

- Definition of a day worker versus a shift worker, an item which is already in the contract for CLGW Local 385, Richmond, B.C., and Local 503, Kamloops, B.C.

- Improvements in the pension.

- Other key language changes in vacation, group insurance, mandatory overtime, the bid system, and other items.

"If we get an integrated COLA, we're not going to hit them for a large wage increase," Burshaw said, "That's what I've been telling them across the table."

Burshaw said he believed that the union in Canada is not just involved in a dispute with Canada Cement Lafarge, but that it is facing a concerted industry drive. "We're not going to buckle under," he told the Voice.

Officers of Local 274, the first local to go out, include Donald Maes, president; Bruce W. Elder, recording secretary; and Paul Shewchuk, financial secretary. The local represents 94 workers at CCL, Fort Whyte.

19. A rigorous standard of review would deeply involve the Board in the bargaining process and leave little "elbow room" for the inherent dynamics of labour negotiations. As the British Columbia Labour Relations Board held in *Noranda Metals Industries, supra*, at p. 160:

Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules, and that is especially the case when a lengthy strike is going on. Archibald Cox has warned of the long-range consequences of too close scrutiny by the Board of the tactics of negotiators:

'There is also danger that the regulation of collective bargaining pro-

cedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.'

Accordingly, while we interpret s. 6 as requiring adherence to certain fundamental principles of reasonable bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement.

20. Going on to apply this approach to the facts before it, the B.C. Board reasoned at page 161:

The facts of this case present two important issues to the Board about the collective bargaining procedure required under s. 6 of the Code. We shall deal first with the meeting of September 5th and the letter it spawned, an incident which puts in question the propriety of direct employer communication with its employees during a strike. CAIMAW did not suggest that it is illegal, as such, for an employer to write its employees, giving its own version of the negotiations, and hoping this will ultimately influence the trade-union to draw closer to the employer position for a settlement. There was no complaint about the letters of June 28th, July 5th, and July 15th. The Union's concern was with the letter of September 5th – the letter to the employees – whose special feature was that it painted the stance of the committee in an inaccurate and disparaging way. That letter may have been defamatory. If written in the course of a representation campaign, it probably would have been a violation of s. 3(2)(f) (which was interpreted by the Board in the recent *Langley Advance* decision). However, we cannot conclude that it was a failure "to bargain collectively in good faith...and to make every reasonable effort to conclude a collective agreement". If this Board were asked to evaluate every distortion of fact or inflation of opinion contained in material written during heated collective bargaining disputes, we would be doing little else. (And we might note that if inaccurate employer letters to employees are a violation of s. 6, then inaccurate union letters to employees might well be a violation of s. 7.) The appropriate remedy for the Noranda letter of September 5th would not be a cease and desist order under s. 8 of the Code. Rather, it was the CAIMAW response to the employees of September 5th together with the meeting of September 15th, (and subsequent events indicate that that was an efficacious remedy).

21. This statement was expressly approved for mature bargaining relationships in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at 1243-4, but as early as 1975 in *Fruehauf Trailer Company of Canada Limited*, [1975] OLRB Rep. Jan. 77, we had taken a very similar position in writing:

As a general matter the Board must be very careful not to insert itself, without hesitation, into the bargaining process as a censor of the communications between parties engaged in this often emotionally charged exercise. A more intrusive approach would provoke disruptive litigation over what is essentially unavoidable human nature. Furthermore we believe that reasonable employees and diligent trade unions have little difficulty evaluating and responding to most of the isolated direct communications that may occur during collective bargaining.

22. A vote pursuant to section 34e is, in effect, an extension of the bargaining process or, at least, a product of an impasse that has arisen out of negotiations. Therefore, it makes sense to provide for the *Noranda Metals Industries* type of latitude as a section 34e vote is approached. In both instances, the parties have an equal opportunity for reply and possess the common object of entering into a collective agreement. The "laboratory conditions" approach which tends to be the standard applied in representation votes have been geared to a very different labour relations context where the parties are often dramatically opposed and unrepresented employees may be easily influenced. However, section 34e does involve a vote and provides an employer with a legitimate opportunity for direct access to employees. This vote will be rendered meaningless and the opportunity abused if an employer is permitted to unlawfully coerce or intimidate employees into accepting last offers and abandoning their right to concerted activity. In this case we are confronted with an alleged threat of plant closure at a time when the parties were at an impasse and the employees had been on strike for almost one month. Several issues, therefore, present themselves in light of the above analysis and in light of the facts before us. First of all, did the employees receive the employer's message? This is a factual issue and arises in this case because the impugned statement was made at a press conference immediately prior to the last offer vote. Newspapers in different cities at different times reported different interpretations of the press conference. Secondly, if they in fact received information emanating from the press conference, was its content such that the average employee would have reasonably construed it as a threat by the President of CCL to close the plant regardless of economic conditions? If there was the clear implication in the statement that the employer would take action solely on its own initiative for reasons unrelated to economic necessities, the statement would not be a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion. Where an employer's conduct breaches this standard, the reliability of the vote will be put in doubt and he will be taken to have forfeited the limited opportunity provided under the section. Moreover, this loss of opportunity should provide a strong disincentive to improper communications independent of the complaint processes of the Act.

23. It is also important to stress that the employer has an ongoing duty under section 14 regardless of section 34e. The decision to place a last offer before bargaining unit employees under section 34e arises because trade union representatives have refused to do so. Their refusal to do so will have likely been based, in part, on the circumstances then existing and the employer's rationale in making the offer. Where the rationale of the employer has undergone a fundamental change because of significant and related changes in circumstances since the offer was made to the trade union, an employer may be obligated under section 14 to place such new information and reasoning before the trade union prior either to requesting or, at least, prior to participating in a last offer vote under section 34e. Section 34e should be limited to those situations where the trade union has refused to place a last offer before the membership after having been acquainted with all of the significant reasons for its acceptance

known by the employer. Where important changes in these reasons have occurred, the trade union may be willing to review its position making a section 34e vote unnecessary. Candor in this respect will also minimize suspicion over the *bona fides* of the employer where these significant new reasons are laid before the employees should the union continue in its refusal to submit the offer to the employees for their consideration.

24. Applying this analysis to the facts at hand, what is the result? The first issue is whether the press conference statement of CCL's President reached the employees in the bargaining unit before they voted and particularly the last two words in the last sentence of that statement. No correspondence to this effect was hand delivered to the employees as the earlier letter communications were. The Woodstock press conference was held during the morning of October 15, 1980 and the local Woodstock paper of that date carried a report on the press conference that made no mention of a possible permanent plant closure. That news report was unexceptionable. The evidence reveals that representatives of other media forms (radio and television) were in attendance at the press conference but no evidence was adduced with respect to the content of the resulting news coverage. As with the Woodstock newspaper report, no reference may have been made to the possibility of a permanent plant closure. The one newspaper article emanating from the Woodstock press conference which reported that "if striking union members from Canada Cement Lafarge Ltd. reject a contract offer today the Woodstock plant may have to be closed down permanently" was reported in the London Free Press on October 16, 1980, the day of the vote. On the evidence, it is not clear that bargaining unit employees in Woodstock would have had an opportunity to read this report or see the headline before they voted. Accordingly, looking at the evidence as a whole, it is a matter of considerable debate whether the employees were actually confronted with a report on the press conference that would have improperly influenced their ability to cast their ballot freely.

25. We do, however, think it important to go on and examine the content of the press conference. The more threatening and intimidating a statement is, the less willing this Board should be to let the case turn on the union's failure to establish that bargaining unit employees in fact had access to the statement in dispute. The more improper the statement, the greater the onus on the person making the statement to establish that it did not reach its intended targets. The statement both in timing and content has given us concern. The President of CCL, who had made no previous pronouncement on the bargaining to employees, went to Woodstock to hold a press conference. The statement emphasizes the state of the economy, labour management relations and the cement industry in particular. The statement ends with a somewhat ominous reference to a possible permanent plant closing, "at worst". At no other time during the course of bargaining or in the communications to the employees had a CCL representative made mention of the possibility of a permanent plant closing. And in the statement itself, no specific rationale was given for the possible plant closing except that of a negative vote. Viewing the statement as a whole and having regard to the strike between the parties and the history of their collective bargaining relationship, can it be said that the average bargaining unit employee could reasonably construe the statement as a threat to close the plant regardless of market conditions and in retaliation to the refusal of employees to accept CCL's last offer? If this construction is reasonable, the threat is contrary to the legislation and it would clearly affect the reliability of the vote as a true measure of the wishes of the employees. See *Yearbook House* (1976), 223 NLRB 1456. Employees have a statutory right to engage in strike action in the pursuit of their bargaining goals and the punitive closing of a plant or the threat thereof is no more acceptable under *The Labour Relations Act* than is a mass firing. See *Fielding*

Lumber Company Ltd., [1975] OLRB Rep. Sept. 665; *The Academy of Medicine*, [1977] OLRB Rep. Dec. 783; and *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577.

26. On the other hand, an employer is equally entitled to achieve proper bargaining objectives through the use of economic sanctions and the statute acknowledges an employer's freedom to express his views (see section 56). The statement that "a negative vote could, at best, see this plant closed for many months" conveys that this employer is serious about its final offer and that it is not going to be easily moved into making further concessions. It is a public commitment to this effect and draws its credibility from the fact that three other plants have already accepted the same offer and the employer has already experienced a month long strike. We are satisfied that the average bargaining unit employee would and should understand this portion of the statement as a statement of bargaining reality. If employees were threatened by the prediction of a longer strike, it was a threat that CCL was entitled to make. In this respect, CCL's statement was a reasonable prediction based on available facts. Indeed, for the Board to prevent employers from making such statements could have the effect of depriving employees of information that conveys an accurate picture, however unfavourable to the union, of what is in store if the voters choose to reject the employer's last offer. Can we so characterize the rest of the statement as it relates to a permanent plant shutdown? Can the ending of the Bath plant statement be similarly characterized? While the situation is very close to the line, we have come to the conclusion that neither statement should be viewed as an unlawful threat under the Act or as undermining the reliability of a vote (past or future). This is a longstanding bargaining relationship. A strike had been in progress for a month and a negative vote could have had the effect of hardening the differences between the parties. CCL's competitors are not on strike. The industry and CCL are operating substantially below their capacities. The full text of the President's statement emphasized all of these contextual matters and the permanent plant closing was put forward as "the worst" case. At this stage of bargaining and under these conditions, the Board cannot conclude that the observation can reasonably be construed as an improper threat to close the plant regardless of market conditions. See *First Data Resources Inc.* (1978-79) CCH NLRB ¶29,409. Moreover, any doubt in this respect must be combined with our doubts that the statement ever reached bargaining unit employees before they voted. The offer had been accepted by three locals of the same trade union and, on balance, we cannot conclude that the vote reflects anything other than the attractiveness of the last offer and the unattractiveness of continued strike action.

27. The Bath statement is somewhat more difficult in that it seems to suggest that reduced employment for years to come is a certainty, but it is explicitly tied to market conditions and the mature employee can make up his own mind whether this prediction is accurate or not. Moreover, the local union at Bath has ample time to counter the employer's statement with its own propaganda. In the context of this collective bargaining relationship, and having regard to the statement as a whole and to the fact that the parties are at impasse, no reasonable employee could have or should have viewed this statement as a threat to reduce employment regardless of market conditions due to the impact of the strike.

28. Finally, had there been an immediate prospect of permanent plant closure at Woodstock, the employer would have been obligated under section 14 to put the situation directly to the trade union together with the details supporting its position. The rationale for this conclusion has been discussed at paragraph 23.

29. We also find that the International's constitution and by-laws do not provide either it or Local 368 with an acceptable defense in refusing to execute the collective agreement. The International's constitution and by-laws are subject to the provisions of *The Labour Relations Act* and any conflict must be resolved in favour of the statute in the circumstances of this case. We stress that in 1980 the parties did not agree at the outset of bargaining that all plants would be subject to the outcome of a single set of negotiations. In such circumstances, an employer's unilateral rejection of that agreement by way of a request under section 34e could itself constitute a violation of section 14, in any event, would justify a trade union in refusing to be bound by a single plant section 34e vote.

30. Having regard to our conclusion that a vote to accept an employer's last offer does not result automatically in a collective agreement, CCL's complaints under sections 63, 65 and 67 are dismissed. In addition, CCL lacks standing to file a complaint under section 60.

31. As for the section 79 complaint filed by the International, it must be dismissed in its entirety. The letters written to the employees are clearly supportable given our decisions on the legal effect of section 34e and the propriety of the CCL statements prior to the vote. We are also satisfied that a *bona fides* concern over the safety of personnel and equipment led to the retention of the security services and that the photographing of picket line activity at strategic times was borne of similar fears. See *The Udylyte Corporation* (1970), 76 LRRM 1850; and *Lerand Leisurelies Inc.* (1974), 87 LRRM 1129.

32. Having regard to all of the foregoing, we issue the following remedy:

- (a) The Board declares that the International and Local 368 are required to submit to the results of the section 34e vote held on Thursday, October 16, 1980;
- (b) The Board further declares that the International and Local 368 have failed to bargain in good faith and make every reasonable effort to enter into a collective agreement by refusing to execute the collective agreement presented by CCL on October 17, 1980;
- (c) The Board directs the International and Local 368 to execute the aforesaid collective agreement forthwith;
- (d) The Board directs Donald Burshaw, International Vice-President and Bill King, President of Local 368 forthwith to advise all employees in the bargaining unit by mail to comply with CCL's return to work arrangements provided such arrangements remains on a reasonable basis.

33. The Board directs the Registrar to reschedule this matter for a hearing on the issue of damages. We have found that both trade unions have violated section 14 and it is now firmly established that a breach of this section may support a request for all resulting damages. However, in this particular case the trade unions did not execute the proposed collective agreement because of a dispute over the legal effect of section 34e (an issue of first impression) and because they did not believe the vote reflected the true wishes of the employees. The latter concern was the product of a last minute controversial statement by the respondent and this

decision now puts that concern aside. It is also not readily apparent that both trade unions should be equally liable and from when damages should run, if damages are appropriate in this situation.

DECISION OF BOARD MEMBER B.L. ARMSTRONG:

1. I dissent from the majority decision in both of these matters.
2. I am especially concerned about the majority decision in respect of the section 79 complaint filed by CCL. They have decided that in the usual case a vote in favour of accepting a last offer will create a collective agreement. Furthermore, the majority has chosen to adopt a "hands-off" policy in regulating employer conduct during the inevitable campaign that precedes a section 34e vote. The combined effect of these two determinations upon the bargaining power of union executive committees in this province will be extremely adverse.
3. In deciding that in the usual case a vote in favour of accepting a last offer will create a collective agreement, the majority has not given sufficient consideration to the total absence of any such direction in the language of the section. Nowhere in section 34e does the Legislature indicate that one possible result of such a vote is the creation of a basis for a binding agreement. How can it be said that such a result will occur "in the usual case?" I do not mean to suggest that section 34e votes are mere opinion polls. However, absent any direct language in the section indicating that a collective agreement may result, I cannot accept that such a result is the "usual" case. Only where the outcome of the vote, in the light of all of the surrounding circumstances, clearly indicates a preference for the employer's offer should the trade union be required to sign an agreement based on that offer. This was not such a case. Improper coercive statements (discussed below) nullified the vote.
4. Assuming the majority to be correct in their interpretation of the normal result of section 34e votes, I cannot agree that this is the usual case. The employer's intimidatory actions prevented the true expression of the employees' wishes as to this offer. At a press conference immediately prior to the vote the employer claimed that "a negative vote could, at best, see this plant closed for many months, at worst, closed forever." This threat of a shutdown was made so late in the campaign that the union did not have an opportunity to counter the threat with an explanation that such threats are often made in the normal course of bargaining. Neither did the individual employees have time to carefully consider the statement themselves. Instead, they were left with such headlines as "Firm threatens to fold if contract rejected" (London, October 16) and "President offers local workers an ultimatum" (Woodstock-Ingessoll, October 15). As a result the trade union was entitled to refuse to sign an agreement based on an offer that was only "accepted" following a threatened plant shutdown. To adopt the language of the majority, I find the content of these communications was such that an average employee would have construed them as threats to close the plant regardless of economic conditions. It follows that I would have found that the trade union had not violated the section 14 duty to bargain in good faith.
5. In dealing with the section 79 complaint filed by the International I would not have dismissed it in its entirety as the majority has chosen to do. Section 58c provides:

58. No employer, employer's organization or person acting on behalf of an employer or an employer's organization,

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

There is considerable evidence in this case to support a finding that the employer has violated the above-noted section. First, there is the threatened shutdown in the press conference statement discussed previously. Second, there is the letter of October 18, 1980 sent to each employee by the company in which employees are informed that they "must return to work within two (2) weeks from the date of receiving this notification." Finally, there is the overt photographing of picket line activity which has an intimidatory effect no matter how *bona fides* the employer's intention. Each of these acts of the employer interferes with the right to strike lawfully which is derived from *The Labour Relations Act*. In the result I would have found that CCL violated the Act.

6. In conclusion I adopt the majority suggestion that there be developed certain ground rules for the taking of section 34e votes and that a "silent period" be put into effect. Regulations such as this will to some extent ensure the reliability of section 34e votes.

1479-79-R International Union of Operating Engineers, Local 793, Applicant, v. Corporation of the Town of Meaford, Respondent.

Bargaining Unit – Municipality operating out of more than one location – Appropriate unit for municipal employees

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members H.J.F. Ade and O. Hodges.

DECISION OF THE BOARD; November 25, 1980

1. This is an application for certification. On July 9, 1980, the Board certified the applicant on an interim basis for two units of employees. The parties are at issue as to whether the employees involved should remain separated in two bargaining units or whether they should all be included in one unit covered by a single formal certificate.

2. On the date of the filing of the application, there were seven employees affected by these proceedings. Four of the employees work in the respondent's public works department. They operate the respondent's trucks, snowplow, streetsweeper and backhoe, and also do some general repair and maintenance work. The other three employees work for the respondent at the Meaford and St. Vincent Community Centre which is located about a hundred feet from the public works department. These employees are involved in maintaining the community centre which is used for hockey in the winter, rollerskating in the summer as well as for community service events, dances and wedding parties.

3. The community centre is administered by a committee of management set up pursuant to the provisions of The Community Recreation Centres Act. The activities of the public works department are overseen by the public works committee of the Town Council. There is no interchange of employees between the community centre and the public works department.

4. Where an employer does business at more than one location in a municipality, the Board's general practice is to describe a separate bargaining unit for each location unless the integrated nature of the operations and/or the community of interest of employees at the different locations is such as to justify grouping the employees at the various locations into a single bargaining unit. The respondent contends, apparently on the basis of this general practice, that employees of the public works department and employees at the community centre should be included in separate bargaining units. The applicant, however, submits that the employees should be included in a single bargaining unit.

5. In certain situations, the Board has concluded that its general practice as set out above should not be followed since to do so would result in the creation of a number of artificially small bargaining units and an unduly fragmented bargaining structure. Accordingly, in the retail food industry the Board generally does not describe a separate bargaining unit for each store location, but rather includes employees at all of an employer's stores in a municipality within a single bargaining unit (see: *Oshawa Wholesale Ltd.* [1965] OLRB Rep. Feb. 584). Similarly, employees working at various locations in different municipalities for the same county or regional school Board are included in the same bargaining unit. (See: *The Cochrane-Iroquois Falls Board of Education* [1969] OLRB Rep. June 368.) In line with this approach, when dealing with municipalities as employers, the Board generally issues certificates for separate units of office staff and non-office (or "outside") staff on a municipal wide basis notwithstanding the fact that employees may work out of different locations. See: *The Corporation of the Township of Markham* [1969] OLRB Rep. Aug. 529 and *The Corporation of the Township of Valley East*, [1970] OLRB Rep. Jan. 1213

6. In our view, the facts of this case do not warrant a departure from the Board's general approach to describing units of municipal employees. To formalize the division of the respondent's employees into two bargaining units would result in two units of semi-skilled employees, one with four employees and the other with only three. In our view, this degree of fragmentation would not be conducive to stable industrial relations and is not warranted by the facts involved. We acknowledge that this determination may result in certain short-run difficulties for the respondent in terms of organizing its affairs for collective bargaining purposes. However, we are satisfied that it will be able to overcome these difficulties. In this regard, we would note that a number of other municipalities employing many more employees than does the respondent and having much more complex organizational structures have for years bargained for all of their non-office staff within a single bargaining unit notwithstanding the fact that the employees work in a number of different departments and are spread out over a number of different locations.

7. Having regard to our reasoning set out above, we are satisfied that the employees affected by this application should be included in a single bargaining unit. In these circumstances, a formal certificate will now issue to the applicant with respect to the following unit of employees, namely:

All employees of the respondent working in the Town of Meaford, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

1789-79-R; 1872-79-R United Cement, Lime and Gypsum Workers International Union, Applicant, v. **Craftwood Construction Co. Ltd.,/Coreydale Contracting Co.**, Respondents, v. The Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Intervener #1, v. Metropolitan Toronto Sewer & Watermain Contractors Association, Intervener #2.

Employee – Owner/operators working for many different contractors – Whether dependent contractors – Degree of dependence on particular employer considered – All relevant criteria reviewed

BEFORE: George W. Adams, Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: James Hayes, Frank Luce and Angelo Natale for the applicant; S. C. Bernardo and T. D. Albani for the respondent Craftwood Construction Co. Ltd.; S. C. Bernardo, Barry Edson and Frank DiPede for the respondent Coreydale Contracting Co.; J. Nyman, G. Wilkes, Al Lefort and Isaac Raymond for Intervener #1; and S. C. Bernardo and Jack Agnew for Intervener #2.

DECISION OF THE BOARD; November 13, 1980

1. These two cases involve applications for certification that are similar in factual detail and raise for the Board's consideration the same principles relating to the dependent contract provisions of *The Labour Relations Act*. The same decision will, therefore, be rendered for both files.

2. In File No. 1789-79-R affecting Craftwood Construction Co. Ltd. the parties have agreed that if the persons subject to the application are dependent contractors, the bargaining unit should be described as:

All dependent contractors of the respondent engaged in handling materials to and from the respondents' job sites in the Regional Municipality of Metropolitan Toronto (or Board Area #8) save and except non-working foremen, persons above the rank of non-working foreman, office and clerical staff, shop employees and security guards.

In File No. 1872-79-R affecting Coreydale Excavating and Grading Co. the unit applied for was described in somewhat similar terms. Paragraph 3 of the application reads:

All employees (dependent contractors) of Coreydale Contracting Co. engaged as truckers in the Municipality of Metropolitan Toronto save and except foremen, dispatchers, persons above the rank of dispatchers and foreman, office and sales staff and persons represented by subsisting collective agreements.

In both cases the respondent companies took the position that the persons subject to the applications were independent contractors. Similarly, in both cases the intervener trade union agreed with the applicant that the persons applied for were dependent contractors but submitted that they were already subject to collective agreements between itself and the respective employers. It was the position of the respondent employers that if the persons subject to the application were in fact dependent contractor, they were not covered by any existing collective agreements negotiated with the intervener trade union. In both files, the Board appointed a labour relations officer to inquire into the duties, responsibilities and dependency of those persons subject to the applications. Two reports were subsequently prepared by labour relations officers and the parties made representations on these reports to this panel of the Board at a hearing convened for this purpose.

3. The Board would record its awareness that a number of similar applications affecting other respondent companies have been filed with the Board and are currently with labour relations officers awaiting the outcome of these two cases. The other applications are:

<u>File No.</u>	<u>Respondent</u>	<u>Applicant</u>
1886-79-R	Coreydale Contracting Co.	United Cement, Lime & Gypsum Workers International Union
1917-79-R	Par-Tex Engineering and Contracting Co. Ltd.	" " "
1975-79-R	S. & F. Excavating Co. Ltd.	" " "
1981-79-R	Ben David Excavating & Contracting Ltd.	" " "
2031-79-R	American Construction Co.	" " "
2186-79-R	Rumble Contracting Ltd.	" " "
2215-79-R	" " "	Ready Mix Building Supply, Hydro and Construction Drivers, Local 230 of Teamsters
2230-79-R	Valentine Enterprises	United Cement, Lime & Gypsum Workers International Union

<u>File No.</u>	<u>Respondent</u>	<u>Applicant</u>		
2307-79-R	Alsi Construction	United Cement, Lime & Gypsum Workers International Union		
2374-79-R	Alcan-Colony Contracting	"	"	"
2392-79-R	Val-Dal Construction	"	"	"
2436-79-R	Maple Earth Moving Co.	"	"	"
0021-80-R	Oshawa Paving	Ready-Mix Building Supply, Hydro & Construction Drivers, Local 230 of Teamsters		
0165-80-R	King Cross-Div. of Colosimo Bros. Contracting	United Cement, Lime & Gypsum Workers International Union		
0166-80-R	Roseway Construction	"	"	"
0207-80-R	Clearway Construction	"	"	"
0439-80-R	Acton Shoring & Excavating	"	"	"
0449-80-R	Badner Engineering Ltd.	"	"	"
0466-80-R	D'Orazio Excavating Ltd.	"	"	"
0537-80-R	Lanterna Homes	"	"	"
0538-80-R	Academy Consolidated	"	"	"
0606-80-R	Gottardo Bros.	"	"	"
0615-80-R	Pilen Construction of Canada	"	"	"
0732-80-R	Bot Construction	"	"	"
1021-80-R	Petrex Construction Ltd.	"	"	"

Craftwood Construction Co. Ltd.

4. Three witnesses were examined. They were A. Di Savino, V. Polsinelli, and L. Facchini.

- (a) *Percentage of income or business derived from work made available by the respondent company.*

From December 15th, 1978 to December 14th, 1979, Di Savino worked for 22 companies. His total gross income was \$39,374.00, of which \$2,058.50 (or 5%) was from Craftwood. During this same period \$13,670.50 was earned from Elmford Construction Company. Di Savino worked for Craftwood from November 21st, 1979, to December 21st, 1979, and was at work on December 14th, 1979, the date of application for certification. From January 11th, 1979 to December 21st, 1979, Polsinelli worked for 12 companies. His total gross income was approximately \$31,228.87, of which \$1,848.00 (or 5.5%) was from Craftwood. During this period \$9,996.75 was earned from Acri Construction. Polsinelli worked for Craftwood from November 15th, 1979 to December 21st, 1979, and was at work on December 14th, 1979. From December 1st, 1978 to December 20th, 1979 Facchini worked for approximately 18 companies. His total gross income was approximately \$27,465.00, of which \$4,013.00 (or 15%) was earned from Craftwood. During this period \$10,549.00 was earned from Alcan-Colony Limited. Facchini worked for Craftwood from November 19th, 1979, to December 20th, 1979, for a total of 174.5 hours. He was at work on December 14th, 1979, the date of application for certification. All three witnesses stated that they arranged for work at various companies. Often they heard of available jobs through other owner/operators. Occasionally the companies would contact them for work at other sites. When starting to work at Craftwood, the length of the job was not discussed. Di Savino heard of the available job at Craftwood through a friend who is an owner/operator. He stated that he did not phone the company before reporting to work. The owner/operator friend of Di Savino's had given him the details of where to report to work, the rate of pay and the time to report to work. Apparently the friend had spoken to someone at Craftwood prior to Di Savino's appearance at work, and that is how this job was arranged. Polsinelli stated that he was not sure who phoned him about the job at Craftwood. He could not remember whether it was an owner/operator friend or someone from Craftwood who called. The person who called him informed him about the pay rate, the locations of the job site and dump site and the time to report to work. Facchini called Craftwood and asked if work was available. He had not heard of the availability of any job there through his owner/operator friends.

(b) *Presence or absence of business initiative or entrepreneurial activity on the part of the owner/operator*

All three witnesses stated that they did not advertise and they were not listed in the Yellow Pages of the telephone book. Facchini stated that he has business cards which he distributes to friends and companies. However, the last time he handed out a business card was nine years ago. The other two witnesses do not have business cards. Di Savino hires a bookkeeper to prepare his income tax. He

claims capital depreciation for his truck. Repairs, insurance and gas are also claimed on his income tax. Di Savino's bank account is in the name of 'Angelo Di Savino Haulage'. His business is registered with the Ministry of Consumer and Corporate Relations. He stated that he thought the registration was necessary in order to obtain a loan. It is not a limited company. Polsinelli hires a bookkeeper to prepare his income tax. Expenses such as repairs, insurance and gas are deducted. In Polsinelli's 1978 income tax return, an expense of \$2,300.00 referring to subcontractors was deducted. Polsinelli stated that he did not hire anyone to work for him and that he did not know what the deduction meant. There was also a deduction of \$1,723.00 labelled subcontractor – casual labour. Polsinelli stated that he didn't know what this meant. Later, he stated that this sum was related to the payment to his two sons for maintenance work that they did on his truck. (i.e. grease, oil, changing tires). Facchini's brother-in-law prepares his income tax.

(c) *Manner of remuneration*

All three witnesses submitted periodic statements and a copy of the daily bills to the contractor. They would make out an invoice at the end of each working day, and the person in charge of the excavating site would sign it. These would be submitted every 15 or 30 days in accordance with the manner in which the particular company paid the owner/operators. Facchini stated that Craftwood paid two times a month. Di Savino stated that he did not discuss the rate of pay with Craftwood. He stated that Craftwood paid him \$23.00 per hour and that he had no idea how this rate was set. Di Savino's pay rates had varied from \$19.00 to \$24.00 per hour during the past year. When asked if there was a particular rate below which he couldn't make a living, he stated "No". He stated that he would work for \$5.00 per hour. Di Savino, could not, or would not, indicate the break-even rate of the truck. He did state that the companies did tell him the amount that they are willing to pay. (However, it should be noted that Di Savino was paid between \$19.00 and \$24.00 in 1979). Finally, he stated that the companies decide what they're willing to pay – whether he "likes it or not". He has never refused to work for the rate a company had set. Di Savino's only source of income is from driving his truck. Polsinelli did not discuss the rate of pay with Craftwood. He knew what Craftwood was paying and he was happy with it. Craftwood paid him \$23.00 per hour. Polsinelli stated that he doesn't negotiate the rate of pay. He stated that if he didn't like what the company was offering, he simply would not work for that company. Facchini was also paid \$23.00 per hour by Craftwood. He stated that he was not told the pay rate of Craftwood. He billed for \$23.00 per hour. He stated that he sets the rates of his pay and that he would lose money if he worked for less than \$21.00 per hour. All witnesses stated that their only source of income in 1979 was from driving their trucks. None received any holiday or vacation pay

from Craftwood or any of the other companies. All received their full gross pay – there were no deductions for income tax, workmen's compensation, unemployment insurance, or Canada Pension Plan.

(d) *Ownership of Tools*

All three witnesses stated that they owned their own trucks. None of the companies gave the witnesses any assistance in the purchase of their trucks. All witnesses stated that they paid for their own fuel, maintenance and repairs on the trucks. All arranged their own financing of the trucks. All pay for their own insurance and licences for their trucks. All witnesses stated that they were the sole drivers of their trucks. Di Savino owns a 1974 Mack dump truck which he purchased in 1978. The name on the truck is 'Angelo Di Savino Haulage'. He received no assistance from Craftwood in its purchase. Di Savino paid \$25,500.00 for this truck and it is financed through a bank with monthly payments of \$650.00. Craftwood sets no restrictions over the amount of insurance. Di Savino has the following licences in his name:

- 1) P.C.V. licence which was transferred to him after the purchase of a previous (but now sold) truck;
- 2) Cartage owner licence – to obtain this he obtained a letter from Active Excavating; and
- 3) a Commercial Motor Vehicle permit.

Di Savino's invoices state 'tandem Mack, rental by the hour'. He stated that with truck rentals, he would never allow a company to have the use of his truck unless he was driving it. Di Savino does minor repairs and maintenance on his truck. He decides whether and where large repairs will be done.

Polsinelli brought his 1973 Mack truck in 1977 for \$14,000.00. Prior to that time, he had worked as a truck driver at Timar making \$6.50 per hour, along with paid benefits. He stated he bought the truck because "I want to work for myself". The name 'Vince Polsinelli Haulage' is on the side of the truck. The purchase of the truck was financed through borrowed money from his family and bank. Craftwood had no restrictions over insurance. Polsinelli has a Cartage licence in his name. This was obtained three years ago with a letter stating that he had a job. (He doesn't remember which company). Polsinelli does not have a P.C.V. licence. He applied for this two years ago and was informed that there were not going to be anymore licences issued at that time. He has recently applied again. Polsinelli stated that he always drives his own truck and wouldn't allow a company to use his truck without him.

Facchini owns a 1974 Mack Truck which he purchased for \$16,000.00.

He stated that he paid cash for the truck. He is now the sole driver of the truck. Facchini's son drove the truck for two months in 1978 while he was recovering from a broken leg. Facchini kept the cheques from the companies and supplied his son with the lunches. He stated that his son was not paid any hourly wage. The name 'L. Facchini' appears on the side of the truck. He has P.C.V. and Cartage Owner Licences in his name. In 1974, Rumble supplied him with a letter stating he had a job in order to obtain the Cartage licence. He bought the truck from Rumble. In 1979, Facchini belonged to two associations:

- 1) the Independent Truckers' Association (membership fee of \$250.00), and
- 2) the Ontario Haulage Association (membership fee of \$200.00).

The Truckers' Association was supposed to assist in finding work, but Facchini stated that it did not. The Haulers' Association found him a job for one month in 1978, and nothing further. Craftwood apparently had 2 or 3 of its own trucks working at the excavation site, and these trucks were doing the same work.

(e) *Contract of employment*

All three witnesses stated that they had never had a contract of employment or any formal agreement with any of the companies, including Craftwood.

(f) *Supervision and control*

All three witnesses stated that they checked with the person in charge of the excavating site for the times to start and finish work each day. They had no control over their hours of work, i.e. – they couldn't start earlier than the time stipulated by the company. All stated that there were no formal rules at the company about reporting to the person in charge when leaving early. However, all stated that it would damage their business relationship with the company if they left early without speaking to the person in charge. There were also no formal rules for calling in sick, but the witnesses stated that they would phone the company and try to arrange for a replacement driver if possible. All witnesses stated that when they were paid by the hour, the company instructed them on the dump site to be used and the route to be used to get there. The witnesses would report to the person in charge when arriving at work, and have their invoices signed before leaving work. The person in charge would decide when the site had to be closed in inclement weather. Di Savino reported to work according to the foreman's instructions. The foreman directed the trucks to the dump site. There were no restrictions on the number of loads he could take. He stated he had never been disciplined by Craftwood. He has never purchased any

material from the company. Di Savino stated that if he refused a load, he supposed he would be sent home. He has never refused a load. The foreman made decisions about lunch breaks at Craftwood. There were two paid coffee breaks. De Savino stated he has never left the job early for personal reasons at any company. He stated he has refused overloaded trips at other companies, but couldn't recall which companies. When he did refuse a load, he was sent home and told not to return to the company. He stated that he had never left a job to take another at a higher rate of pay or for a longer duration. He stated to do so would hurt his reputation. Finally, he stated that if he took a job with a company, it would be expected that he would continue to work for as long as he was needed. Polsinelli felt that he had to report to the company if he was unable to report for work. He stated that he has never quit a job before it was completed, or to make more money. He stated that he has never been disciplined by any company. Facchini also wouldn't leave a job before it was finished. He stated that he had never been disciplined by a company. It was previously necessary for him to leave a job early (at 4:00 p.m.) for dental work. He reported this matter to the foreman at the beginning of the day.

(g) *Detailed Statement of Income for Period December 1, 1978 to December 20, 1979 - L. FACCHINI*

<u>Company</u>	<u>Amount</u>	<u>% Total Income</u>
York Excavating	\$ 3,323.00	12.1
Will Thorn Contractors Ltd.	1,100.00	4.0
Kalabria Construction Ltd.	220.00	0.8
Petrex Construction	528.00	1.9
D.S.W. Investments	492.00	1.8
Fred Ostron	480.00	1.8
American Construction	480.00	1.8
Rumble Contractors Ltd.	5,308.00	19.3
Clearway Construction Limited	5,519.00	20.1
Con Drain Construction Co. Ltd.	1,683.00	6.1
Angellotti Contracting Ltd.	189.00	0.7
Craftwood Construction Co. Ltd.	4,013.00	14.6
Gabriel Excavating and Grading Ltd.	640.00	2.3
Savini Construction Co. Ltd.	198.00	0.7
Alcan-Colony Ltd.	1,005.00	3.7
Tace Construction Ltd.	1,944.00	7.1
Kaneff	220.00	0.8
Acri	123.00	0.4
18 Companies	\$27,465.00	100.0

Detailed Statement of Income for Period January 16, 1979 to August 3, 1979 - V. POLSINELLI

<u>Company</u>	<u>Amount</u>	<u>% Total Income</u>
Acri Construction	\$ 9,204.75	33.2
Lou Savini	3,948.50	14.2
Armbro Construction	2,280.00	8.2
Warren Bitulithic Ltd.	722.62	2.6
Farry Excavating	143.00	0.5
Alcan-Colony	660.00	2.4
Costa Trucking	440.00	1.6
Craftwood Construction	1,848.00	6.7
Petrex	69.00	0.2
Four Valleys Excavating	1,265.00	4.6
Will Thorn Construction	4,983.00	18.0
San Joe Excavating	2,156.00	7.8
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12 Companies	\$12,719.87	100.0

Detailed Statement of Income for Period December 15, 1978 to December 14, 1979 - A. DI SAVINO

<u>Company</u>	<u>Amount</u>	<u>% Total Income</u>
Craftwood Construction		
Company Limited	\$ 2,058.50	5.2
Elmford Construction		
Company Limited	13,670.50	34.7
Marab Excavating	870.50	2.2
Badnar Engineering		
Construction	2,410.00	6.1
Colosino Brothers Limited	3,410.00	8.7
Cerrito Excavating	1,122.00	2.8
Alcan-Colony Construction	1,650.00	4.2
Cafagna Brothers Construction	6,127.00	15.6
Sanjoe Excavating	354.50	0.9
Mora Excavating	399.00	1.0
Community Home	264.00	0.7
R. C. Contracting	99.00	0.3
Sahara Development	176.00	0.5
Maeo Excavating	192.00	0.5
Raimar Holdings	451.00	1.1
Gottardo Brothers	108.00	0.3
Boston Excavating	242.00	0.6
Adeo Excavating	1,700.00	4.3
Wasero Construction Limited	869.00	2.2
M.A.D.S. Haulage	181.00	0.5
York Excavating	2,725.50	6.9
Angellotti Contracting	294.00	0.7
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20 Companies	\$39,374.00	100.0

Coreydale Excavating and Grading Co.

5. Three witnesses were examined. These were G. Fedele, A. Romano and A. Quaranta.

- (a) *Percentage of income or business derived from work made available by the respondent company.*

From January 1, 1979 to December 31, 1979 Fedele worked for 18 companies. His total gross income was \$43,757.00, of which \$612.00 was from Coreydale (1.4% of his total income). During this period, \$24,253.50 (55.4%) was earned from Val-Dal Construction Limited. In 1978, Fedele worked for 13 companies with a total gross earning of \$11,518.00. None of this work was for Coreydale. Fedele worked for Coreydale on December 10, 11 and 20, 1979, for a total of 25½ hours. He stated that he worked during the first week of January, 1980, but he could not remember for whom. From January 1, 1979 to January 7, 1980, Romano worked for 21 companies. His total gross income was \$40,230.50 of which \$648.00 was from Coreydale (1.6% of his total income). During this period, \$31,466.50 (78.2%) was earned from Bot Construction. Romano stated that he had worked for Coreydale several years ago, but he could not remember the dates. His income statements indicated that he worked for Coreydale on January 4, 5 and 7, 1980. From July 17, 1979 to January 7, 1980, Quaranta worked for 8 companies. His total gross income was \$26,999.00 of which \$828.00 was from Coreydale (3.1% of his total income). During this period, \$11,312.50 (41.9%) was earned from York Excavating. Quaranta worked for Coreydale on December 17, 18, 20 and 21, 1979. He worked 9½ hours for Coreydale on January 7, 1980. All three witnesses stated that they arranged for work at the various companies. Often they heard of available jobs through other owner/operators. Occasionally the companies would contact them for work. The witnesses contacted Coreydale for work with that company. When work at one site was completed, the witnesses would seek work at other sites. When starting to work at Coreydale, the length of the job was not discussed.

- (b) *Presence or absence of business initiative or entrepreneurial activity on the part of the owner/operator.*

All three witnesses stated that they did not advertise and that they were not listed in the Yellow Pages of the telephone book. All witnesses had business cards, which they handed out on an irregular basis to the various companies. All witnesses have their own book-keeper. Fedele's income tax and bank accounts both read Gregorio Fedele Haulage. Fedele keeps a separate bank account from his personal accounts. In 1977, Romano registered the name under which he carries on business as Alex Romano Haulage. Cheques are

made payable to Alex Romano Haulage and work is commenced with a company as Alex Romano Haulage. Romano stated that he registered as Alex Romano Haulage because the bank would not accept his cheques unless he did. Romano claims business expenses for his truck on his income tax (i.e. repairs, insurance, gas and oil, etc.). During 1978 and 1979, Romano had \$398.00 and \$463.00 listed respectively for 'advertising and promotion'. He stated that he does no advertising, but that he often takes people out for meals for the purpose of obtaining business. These included foremen and superintendents. Also, in both years he claimed deductions for office space used in his home (1978 – \$744.00; 1979 – \$1,119.00). Quaranta purchased his truck in partnership with G. Garsone and they operate under the name 'A & G Haulage'. This is an oral agreement. The name under which they carry on business is registered as 'A & G Haulage'. This business is not incorporated. The partnership only concerns the operation of the truck. The truck was purchased with a down payment of \$8,000.00 from each partner. The truck was financed through the truck dealership over four years with monthly payments of \$1,200.00. The financing was arranged by both partners. Quaranta pays himself a salary of \$250.00 per week. There is a joint bank account with his partner. At the end of the year, both partners will divide the profits from the operation of the truck. Quaranta always drives the truck. When the truck was purchased, Quaranta left his job of five years as a bulldozer operator. He had been earning \$350.00 – 400.00 per week net, and also enjoyed paid benefits of vacation and statutory holidays, all under a trade union contract. When asked why he bought a truck, Quaranta replied, "Because I wanted to try to make more money and to try out the business". Also Quaranta was asked, "Is it safe to say when you run your own business, you're your own boss?" – answer, "Yes". Fedele had been involved in a partnership with another person called New-Way Construction for 1½ years (from 1977 to August 1978). The assets consisted of two trucks and a front-end loader. Fedele drove the truck, his partner operated the front-end loader, and a driver was hired for the second truck. Fedele's present truck was never an asset in the partnership. This business was and still is registered. It has not been trading or doing business under that name since August, 1978. The partnership business is dormant and Fedele has been working alone since August, 1978.

(c) *Manner of remuneration*

All three witnesses submitted periodic statements and a copy of the daily bills to the respondent company for payment. They would make out an invoice at the end of each working day and the person in charge of the excavating site would sign it. These would be submitted every 15 or 30 days in accordance with the manner in which the particular company paid the owner/operators. Payment to the owner/operators takes from 15 days to 3 months. The

average time appears to be 1½ months for payment. Fedele stated that when he phones a company or when they phone him for work, he asks what the rate of pay is. If he thinks the amount of pay is too low, he does not work for the company. He stated that the minimum amount he would work for was \$22.00 per hour. However, he stated that "I always ask for more, but everyone pays more or less the price". With respect to Coreydale, Fedele stated that he asked \$25.00 per hour and the company offered and paid \$24.00 per hour. Romano stated that he is not instrumental in deciding hourly rates of pay but he has asked for a specific hourly rate. He stated that companies have raised their rates to what he was asking but he was unable to provide any examples of this. He stated that the owner/operators are paid basically the same rate of pay (give or take \$1.00). For Coreydale, no rate of pay was discussed when Romano phoned for the job. He stated that he spoke to other drivers and heard from them that Coreydale was paying \$24.00 per hour and he billed Coreydale that amount. Romano stated that he would refuse a job that paid less than \$20.00 per hour. He stated that the companies state the rate of pay, and that his choice was to work for the company at the rate they were offering or not go to work at all. Romano calculated his expenses so he knows the hourly rate at which he would not make money. For Coreydale, Romano stated that there were no negotiations over the amount of pay – he was paid \$24.00 per hour. He later stated that he had asked Coreydale for \$25.00 per hour but was told that the company was paying everybody \$24.00 per hour. As mentioned earlier, Romano was paid a salary of \$250.00 from his partnership. That is if he works a full week. If he only works two days in a particular week, he is paid for the two days only. If the truck cannot be operated (e.g. if damaged), he stated he would not be paid any money. All witnesses stated that their only source of income in 1979 was from driving their trucks. None received any holiday or vacation pay from Coreydale or any of the other companies. All received their full gross pay – there was no deductions for income tax, workmen's compensation, unemployment insurance or Canada Pension Plan.

(d) *Ownership of tools*

All three witnesses stated that they owned their own trucks. None of the companies gave the witnesses any assistance in the purchase of their trucks. All witnesses stated that they paid for their own fuel, maintenance and repairs on the trucks. All arranged their own financing of the trucks. All pay for their own insurance and licences for their trucks. All witnesses stated that they were the sole drivers of their trucks. If they became ill, they stated that the trucks would remain idle. Fedele bought a 1974 Mack Truck in December, 1978 for \$25,500.00. He arranged for his own financing from the bank. He has the following licences, all in his own name – P.C.V., Commercial Motor Vehicle Permit, and a Cartage Owner Licence. The

insurance for the truck is in his own name. Fedele's name is the only one that appears on his truck. Fedele stated that he never hires anyone to drive his truck and he never hires anyone else with a truck to do a job. For Coreydale, Fedele stated that he did not discuss the size of his truck or its insurance when he phoned for work. He stated that Coreydale had its own trucks on the job doing the same work. Fedele stated that he does minor repairs and maintenance work on his own truck. Romano bought his Mack truck in July, 1979 for \$55,070.00. This is the only truck he presently owns. From 1974-76, Romano owned two trucks. He employed another driver and paid him a regular wage. He sold the second truck in the spring of 1977, and since then has operated as an owner/driver of one truck only. The purchase of the Mack truck was financed by Romano through the bank. He is the only driver of the Mack truck but stated that if he were ill for a lengthy period of time, someone else would drive his truck. However, this has never happened. The truck has only Romano's name on it. Romano has a P.C.V. licence and Commercial Motor Vehicle Permit in his own name. These licences and insurance are all paid for by Romano. If Romano is fined for driving an overloaded truck, he is responsible for the overload and the payment of the fine. Romano stated that he never owns the materials he carries in his truck. Romano stated that he was not asked about insurance by Coreydale (nor at any other company). He stated that he purchased the truck so he could work for himself - "If you don't want to go to work you don't have to go the work". Quaranta and his partner, Garzone, bought their 1979 Mack truck in July, 1979 for \$57,000.00. (The financial arrangements over this were stated in paragraph 5.(b).) Quaranta is the sole driver of the truck. The name on the truck is 'A & G Haulage'. Quaranta has no P.C.V. licence. In order to obtain his Cartage licence, Quaranta had to submit a letter from the company that was giving him work. This letter was from Kelco Sand and Gravel, the first company that Quaranta worked for after the truck was purchased. No letter from a company was required when Quaranta purchased the truck. For Coreydale, Quaranta was asked the size of his truck, but was not asked about licences or insurance. Quaranta also stated that there were Coreydale trucks at the site also doing the same work. Quaranta's statements indicated that he rented his truck to York Excavating at \$25.00 per hour from October 13 to October 31, 1979. He has also rented his trucks to other companies (e.g. to York Excavating in mid-September, 1979). Quaranta was asked, "When company wants a truck, do they care who drives the truck so long as they get a truck?" He answered, "No, I don't think it matters". However, he later stated that he has never rented the truck to anyone without operating it himself.

(e) *Contract of employment*

All three witnesses stated that they had never had a contract of

employment or any formal agreement with any of the companies, including Coreydale.

(f) *Supervision and control*

All three witnesses stated that they checked with the person in charge of the excavating site for the times to start and finish work each day. They had no control over their hours of work, i.e. – they couldn't start earlier than the time stipulated by the company. All stated that there were no formal rules at the company about reporting to the person in charge when leaving early. However, all stated that it would damage their business relationship with the company if they left early without speaking to the person in charge. There were also no formal rules for calling in sick, but the witnesses stated that they would phone the company and try to arrange for a replacement driver if possible. All witnesses stated that when they were paid by the hour, the company instructed them on the dump site to be used and the route to be used to get there. The witnesses would report to the person in charge when arriving at work and have their invoices signed before leaving work. The person in charge would decide when the site had to be closed in inclement weather. The companies also had an estimate of the time necessary to go to the dump site and return, although the drivers were not given strict time limits. Even when the owner/operator is being paid by the load, it would be in his interest to return from the dump site as quickly as possible. All witnesses stated that while they could refuse an overload, but if they do, the work association ends. Most companies do not pay if the owner/operator reports to work, but for some reason there is no work to do. Fedele stated that some employers pay one to two hours in this situation. This was not the case at Coreydale. Fedele stated that he would refuse a job if he thought his truck would be damaged. At Coreydale, the timekeeper kept track of their hours of work and signed the invoices at the end of each day. There was an unpaid lunch break, but the owner/operators would work if requested. There were two paid coffee breaks. The foreman instructed them on the location of the dump site and the route to take to get there. Romano stated that he would not leave the job for another higher paying job because the original company would not hire him back. Romano stated that he would notify a company if he was planning a vacation. However, he does not take vacations in the summer "because in the summer you work". Romano stated that he took vacations in the winter when there was little work available.

(g) *Detailed Statement of Income for Period January 1, 1979 to December 31, 1979 – G. FEDELE*

<u>Company</u>	<u>Amount</u>	<u>% Total Income</u>
Four Valleys Excavating Ltd.	\$ 540.00	1.2
Gottardo Brothers	5,996.00	13.7
Duncan Reynolds General Contractor Ltd.	390.00	0.9
Boston Excavating	667.00	1.5
Palmisano Construction Ltd.	397.50	0.9
F C M Construction	1,844.00	4.2
Rumble Construction	1,541.00	3.5
Land Excavating	2,117.00	4.8
Nardi Excavating	737.00	1.7
Eaton Construction Ltd.	616.00	1.4
Val-Dal Construction Ltd.	24,253.50	55.4
Sandjo Excavating Ltd.	350.00	0.8
Mayclair Homes Ltd.	460.00	1.1
Fermar Paving Ltd.	1,320.00	3.1
Silver Rose Construction Ltd.	345.00	0.8
Italian Transport	168.00	0.4
Costa Trucking Ltd.	1,403.00	3.2
Coreydale Construction	612.00	1.4
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18 Companies	\$43,757.00	100.0
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Detailed Statement of Income for Period January 1, 1979 to January 7, 1980 - A. ROMANO

<u>Company</u>	<u>Amount</u>	<u>% Total Income</u>
Bot Construction	\$31,466.50	78.2
Konto Corporation	2,310.00	5.8
Marsello Construction	176.00	0.4
Celano Excavating	130.00	0.3
Accucom Ltd.	147.00	0.4
Redcliffe Homes	393.00	1.0
Anthony Pooles Limited	1,008.00	2.5
All Types Excavating	409.00	1.0
R. C. Contracting	187.00	0.5
G.A.G.A. General Contracting	616.00	1.5
Marsan Excavating & Grading	388.50	1.0
J.M. Guest Ltd. Utility Div.	220.00	0.5
Maio Excavating Ltd.	198.00	0.5
Northwest Excavating Ltd.	231.00	0.6
Rena Road Paving & Concrete	180.00	0.4
York Construction	240.00	0.6

<u>Company</u>	<u>Amount</u>	<u>% Total Income</u>
Golzan Construction	228.00	0.6
Four Valleys Excavating	448.50	1.1
G. Zanata Haulage	195.00	0.5
Canada Brick	408.00	1.0
Coreydale Construction	648.00	1.6

21 Companies	\$40,230.50	100.0
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Detailed Statement of Income for Period July 17, 1979 to January 7, 1980 – A. QUARANTA

<u>Company</u>	<u>Amount</u>	<u>% Total Income</u>
Kelco Sand & Gravel	\$ 8,891.00	32.9
Metric Excavating	850.00	3.1
Marcoccia Haulage	1,125.00	4.2
London Excavating	2,273.50	8.4
York Excavating	11,312.50	41.9
Peter Excavating	1,503.00	5.6
Boston Excavating	216.00	0.8
Coreydale Construction	828.00	3.1

8 Companies	\$26,999.00	100.0
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6. On behalf of the applicant and intervener, it was submitted that the only distinguishing feature of these two cases from the many other cases in which dependent contractor status has been found by the Board was the low percentage of total income flowing to the owner/operators from the two companies. In this respect counsel for the applicant argued that this fact should not be allowed to obscure the subservient relationship between the companies and the owner/operators. It was submitted that the low percentage of income simply reflected the highly mobile nature of employment in the construction industry and that when all the evidence was considered the owner/operators more closely resembled employees than independent contractors. In support of these submissions the Board was referred to *Fownes Construction Co. Ltd.*, [1974] 1 Can LRBR 453; *Midland Superior Express Limited* (1974), 4 di 30; *Purple Heart Film Corporation*, [1979] OLRB Rep. Sept. 900; and Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* (1965), 16 U.T.L.J. 89. The applicant sought to distinguish many of these earlier dependent contractor cases on the basis that they dealt with a stable commercial relationship, many times centering on a pit or quarry. Counsel was candid in stating that the instant applications raised for the

first time the issue of whether or not this Board would recognize “dependence on a number of employers or on an industry”. The applicant reviewed with the Board the more general matters of (i) vehicle ownership; (ii) method of remuneration; (iii) the project orientation of the work; (iv) the hours of work and method of supervision; (v) and the extent of entrepreneurial initiative. Emphasized was the “take or leave it” method of setting remuneration; the highly routinized nature of work; the *de facto* control exercised by the companies in light of the nature of the work; and the absence of any real entrepreneurial initiative. Counsel for the intervener adopted the applicant’s submissions, but sought to support the viability of collective bargaining by these owner/operators by reference to its own collective agreements with many of the companies subject to the applications referred to in paragraph 3. For example Coreydale is a member of the Toronto and District Excavators Association and Craftwood is a member of the Sewer and Watermain Association. Both associations have collective agreements with Local 230 pertaining to employee/drivers. He stressed that the kind of work being done by the owner/operators for these two companies was essentially the same as that performed by their regular employees who were members of Local 230. It was the intervener’s position that this feature of the cases demonstrated that the owner/operators worked within a defined labour market. It was submitted that owner/operators were used to supplement the trucking capacities of the two companies and that the owner/operators were subject to the same disparity in bargaining power that pertained to the drivers regularly employed by Craftwood and Coreydale. It was submitted that if the latter employees could have the benefit of collective bargaining, the purpose of the dependent contractor provision must surely embrace the conclusion that the owner/operators subject to these applications may also engage in collective bargaining. Counsel concluded by pointing out that everything about the relationship was dictated by the two companies. The only decision made by the owner/operators was the decision to work with the particular company or not.

7. Counsel for the respondent companies distinguished the British Columbia Labour Board cases on the basis that the B.C. Board could only vary an existing bargaining unit to include dependent contractors. Because of this restriction, the viability of collective bargaining was almost guaranteed and the dependent contractor applications were definitely restricted to a defined labour market. It was submitted that operating within this legislative framework, the B.C. Board could afford to give a very liberal or generous interpretation to economic dependency. Counsel also submitted that the intermittent contractual relationships of the owner/operators are not analogous to the way in which regular employees are used by these two companies. The regular employees are not let go after each project but continue in employment with the two companies for the duration of the construction season. Counsel directed the Board to that evidence in the transcripts where owner/operators testified that they had been regular employees at one time and had been employed continuously on such occasions. Counsel exhaustively reviewed the evidence with the Board in support of the conclusion that all of the usual indicia pointed to an independent contractor relationship. Particular emphasis was given to (1) the method by which work was obtained; (2) the investment of the owner/operator in his equipment; (3) the tax advantages and personal freedom associated with the work of the owner/operators; (4) the reasons for entering into this type of work which centered on the choice of the owner/operator to better himself; (5) the absence of discipline and any meaningful control; and (6) the very low percentage of total income flowing from the two respondent companies to the six owner/operators. Counsel disputed the assertion that these applications were, in reality, restricted to a few companies and advised the Board that there are 180 excavation and sewer and watermain contractors in the Toronto area alone. He submitted that a review of the companies having retained the

services of the owner operators revealed that some were roadbuilders, some were developers and others were trucking companies. Counsel strongly disagreed with the submission of the applicant and intervener that the cases pertained to a defined labour market. He argued that hundreds of companies might use the services of owner/operators and these companies could be unionized, non-unionized and, if the former, could be subject to either association bargaining or individual local bargaining. In requesting that the applications be dismissed on the basis of a lack of economic dependency, counsel for the respondents referred the Board to *Crawford Sand and Gravel*, [1980] OLRB Rep. Mar. 308; *Niagara Veteran Taxi*, [1979] OLRB Rep. Nov. 1056; *Sherman Sand and Gravel*, [1978] OLRB Rep. May 459; *Dominion Dairies*, [1978] OLRB Rep. Dec. 1083; *Giordano Sand & Gravel*, [1978] OLRB Rep. Nov. 989; *Comfort Guard Services*, [1978] OLRB Rep. Oct. 905; *Flintkote Co. of Canada*, [1978] OLRB Rep. Sept. 822; *Dufferin Aggregates*, [1978] OLRB Rep. Mar. 278; *Consolidated Sand & Gravel*, [1978] OLRB Rep. Mar. 264; *Superior Sand, Gravel & Supplies*, [1978] OLRB Rep. Feb. 119; *Indusmin Limited*, [1979] OLRB Rep. Mar. 213; *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104; and *Adbo Contracting*, [1977] OLRB Rep. April 197.

Decision

8. Prior to the enactment of the subject dependent contractor provisions, *Livingston Transportation Limited*, [1972] OLRB Rep. May 488 set out the various tests that have been utilized in determining whether a person is an employee or an independent contractor. While many of these tests originated in a context quite different from that in which modern collective bargaining now finds itself, they have been employed by this Board albeit as guidelines and with a flexibility aimed at implementing the purpose of *The Labour Relations Act*. It is therefore useful to determine first whether the owner/operators qualify as employees without regard to the dependent contractor provisions of the statute. It is our view that they do not so qualify. Whether one looks to the statutory purpose test, or to whether the six owner/operators are carrying on business for themselves as opposed to the respondent companies or to the fourfold test suggested by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.) at 169, the only conclusion that can reasonably be drawn is that, unless the owner/operators can be considered dependent contractors within the meaning of section 1(1)(ga), they are not employees for the purpose of *The Labour Relations Act*. The facts in the two cases before us should be contrasted with those in *Livingston Transportation Limited*, *supra*, and *General Concrete of Canada Ltd.*, [1975] OLRB Rep. Mar. 234. In the *Livingston* case the vehicles, while owned by the operators, were painted in the colours and insignia of the respondent company. They were acquired in light of the respondent's specifications. Replacement drivers had to be approved by the respondent. The operators worked exclusively for the respondent. P.C.V. and motor vehicle licences were registered in the respondent's name. All business records were kept by the respondent and the owner/operators had none of the trappings of the independent businessman. Similarly, in *General Concrete* the vehicles exhibited the logo of the respondent and its colours. Operators wore the respondent's uniforms. Vehicles were purchased, in most instances, according to the respondent's specifications. The respondent was, in most cases, involved in the purchase of the vehicles as guarantor and P.C.V. licences were most often restricted to the respondent, although in the name of the owner/operator. Once again, the respondent represented the principal source of revenue of the owner/operators. All of these facts led the Board to conclude that the respondent companies had voluntarily continued to exercise the same or a similar control exercised over the regular employees and the formalistic structuring of the relationship had to give way to this *de facto* employment relationship having regard to the

purposes of *The Labour Relations Act*. In both cases the owner/operators could not be considered independent of the respondent companies. The facts in the instant cases are quite to the contrary. All the owner operators had their own bookkeeper and a number had business cards. Each had voluntarily purchased a vehicle without any form of involvement by the respondent companies. Each had so structured himself to take advantage of the tax laws applicable to the independent contractor. None of the vehicles exhibit the colours or insignia of the respondent companies. All relevant licences are in the names of the owner/operators. Work is usually obtained through the effort of the owner/operator or his friends and acquaintances. There is no systematic call-in procedure administered by the respective companies. Finally, the owner/operators have the freedom to work elsewhere and exercise this freedom on a regular basis. On the other hand, the regular employees of the respondent companies are employed on a continuous basis throughout the construction season and from project to project. Accordingly, if the owner/operators are to engage in collective bargaining under *The Labour Relations Act* they must be found to be dependent contractors. And, unfortunately, *Purple Heart Film Corp.*, *supra*, does not help us with this determination because the Board in that case made no final determination on this point.

9. These two cases deal with owner/operators who, during 1979, drove their trucks for a substantial number of companies. These owner/operators worked for the two respective companies for a short period of time (ranging from 3 days to one month), and earned only a small portion of their total income from these companies. The basic issue to be resolved is the determination of how transitory a relationship can be in determining whether or not these owner/operators are dependent contractors under section 1(1)(ga) of *The Labour Relations Act*. The *Act* defines dependent contractor in section 1(1)(ga) as:

(ga) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

(gb) "employee" includes a dependent contractor.

And section 6(4) provides:

A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

Dealing with a similar question of dependency in *Fownes Construction Co. Ltd.*, [1974] 1 Can LRBR 453 at page 462, the British Columbia Labour Relations Board observed that:

"the only major roadblock to the application of the definition is the

question of whether any of these owner/operators can be said to be dependent contractors of Fownes Construction itself. The difficulty is the *intermittent relationship* between any one owner/operator and Fownes. *Rarely does an owner/operator work on a continuing basis* for one contractor in the construction industry. Instead, when the contractor bids a job and wins it, his superintendent phones around and obtains the necessary number of trucks and drivers. The owner/operators come in and work on the project until it is finished and then go on to work for another contractor. . . . *If it were the normal pattern* in an industry for employment to be on a regular, continuing basis with one employer, then the fact that contractors were engaged for short periods by large numbers of persons would be a significant reason for finding they were independent rather than dependent contractors. However, *employment in the construction industry in fact closely resembles the use made of owner/operators*. Employees work for particular contractors for the period. They are needed on a specific job, and then move on to the next project and the next contractor. This intermittent character of their employment does not affect their employee status for purposes of collective bargaining. Neither should it affect the status of the owner/operators as dependent contractors.” [emphasis added]

That Board therefore focused its attention on the wording in the dependent contractor legislation which states “more closely resembling the relationship of an employee” – wording that is also found in the Ontario definition. However, it is also important to note that section 48 of the *B.C. Labour Code* provides:

- (1) The board may, on the application of a trade union or a group of dependent contractors, vary a certification of a trade union as a bargaining agent to include dependent contractors, where the board is satisfied that
 - (a) a majority of the dependent contractors consent to representation by the trade union; and
 - (b) reasonable procedures have been developed to integrate dependent contractors into the bargaining unit.
- (2) A dependent contractor included in a certification under subsection (1) shall be deemed an employee for the purpose of this Act.

10. Moreover, a reading of *Vancouver Printing Specialities et al*, [1975] 1 Can LRBR 193, makes it evident that the successful application of the B.C. provision is far from automatic in the marginal cases. The union in that case applied to vary its certification to a bargaining unit of “...all dependent contractors (i.e. those engaged in trucking) from the circulation department of the company.” The characteristics of the truckers varied from substantial cartage companies who were not dependent on the company, to individuals who did the work on a part-time basis, to truckers who relied solely on this work for their income. Although this case did not involve the transitory nature of these truckers’ employment, their employment did not follow the “usual routine of an employee. Because all of the papers [had

to] be taken in many different directions all at the same time, a large number of contractors must be assembled to work for short periods.” (p. 199) The Board concluded that it had not been shown that collective bargaining was appropriate for a portion of these outside contractors particularly given the nature of the employees in the bargaining unit. On the other hand, in *Pacific Press and Vancouver New Westminster Newspaper Guild Local 115*, [1977] 1 Can LRBR 342, the Guild successfully applied for a determination as to the legal status of a number of regular freelance reviewers who wrote regular columns reviewing events in areas of their expertise such as art, music and drama. The freelance reviewer earned a flat rate for each article written but “because of the regular nature of the reviewing function, there tended to be a normal amount consistently earned by each reviewer.” (p. 347) Time spent working by the reviewers varied from 15 to 40 hours per week, and this work was performed on a year-round basis. Percentages of income earned ranged from 50% to 90% from this work. The Board concluded that the freelancers were dependent contractors on the basis of facts indicating that the expertise or specialization involved in the work was similar to that of staff reviewers; that the freelance reviewers were part of the organization of the newspaper and identified with it; that the newspaper controlled the time available to do the work and selected the events to be covered; that the fees earned varied little on a monthly basis though they were calculated on a flat fee for review basis; that the reviewer could be summarily terminated and that there was a serious limitation on alternative remunerative work. But, in discussing the definition of ‘employee’ under the Code the Board indicated that boundaries to the dependent contractor concept had to be recognized when it wrote:

“sometimes employees work on commission or on a profit-sharing basis (such as salesmen or fishermen); some employees are subject to very little in the way of meaningful direction or control (such as professionals); some employees work primarily for training or education, rather than to earn a living (such as apprentices or interns). But while this concept of employee can be stretched a fair distance, ultimately it does run up against its legal boundaries. In our economy one finds many examples of individuals who provide valuable services to a business, but do so as independent entrepreneurs or professionals.” (p. 349)

11. In *Midland Superior Express Limited* (1974), 4 di 30, the transitory nature of the employment of owner/operators was not in issue. These owner/operators were hired under verbal contracts whereby their tractor was hired together with their services as drivers to haul the freight of the company. These drivers could not use their tractors for any other purpose than hauling freight for the company because they did not have the time to do so and the operating licences were in the name of the company. On these facts, the Canada Board found these owner/operators to be dependent contractors. The facts in the instant cases are materially different. Similarly, in *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104, “the truckers’ principal source of revenue was through the delivery opportunities made available by the respondent...” With respect to total fiscal revenues, a driver was shown to earn the lion’s share of his income from the haulage services required by the respondent.” (p. 107) Against these facts the Board was moved to observe that:

“[t]he watch word of the definition is ‘dependent’ and dependent is to be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service having regard to the industry or undertaking under review. It therefore follows that the status of the

'dependent contractor' must be matched and plotted in relation to the terms and conditions of 'employees' in like industries to determine whether he, in a *de facto* sense, more resembles them." (p. 108).

On the issue of opportunity for economic mobility as a measure of independence (an opportunity not exercised by the owner/operators in that case), the Board stated at paragraph 15:

The Board agreed that the opportunity for economic mobility is a factor in measuring the degree of independence exhibited by a particular entrepreneur in meeting his financial objectives. Indeed, perhaps in a particular circumstance it may very well follow that the individual entrepreneur may fall outside the definition of "dependent contractor" notwithstanding his election to extend the benefits of his service to one particular customer. Whatever that circumstance may be we are clearly of the view that when measured against the consideration of other significant factors the individual trucker reviewed herein does not fall into that category. In examining the Labour Relations officer's Report the Board was impressed with the length of service with the respondent of some of the truckers. In several of these instances these drivers have not demonstrated any individual initiative to indicate they were at all self-reliant in expanding the parameters of their "business". The sheer uniformity of the terms and conditions imposed by the respondent without negotiation or, indeed, often times without consultation in satisfying the trucker's financial needs, contradicts any suggestion of an entrepreneurial relationship. What are the special inducements that have been offered by the respondent in its dealings with the truckers that would persuade them to curb their growth potential by committing their business destiny to the respondent's enterprise? Indeed, on such too frequent an occasion, the evidence indicates, a driver was "shown the gate" in the event independent initiative was exercised in the refusal of a load that was viewed by him as not being particularly profitable.

In this light we do not understand paragraph 17 of this decision as a wholesale adoption of the *Fownes* approach, but rather as a rejection of any requirement of a "continuing [legal] obligation" between a respondent company and owner/operator.

12. In *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197, the complainants earned their living by hauling various loads in their own dump trucks (i.e. as owner/drivers). Four of the five complainants obtained most of their work through a person who styled himself as a 'broker'. In its determination of the status of these owner/drivers, the Board made a distinction between "economic dependence" and "economic vulnerability" at page 203:

"economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. *Mere economic vulnerability*, however, is not a sufficient basis for finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker." [emphasis added]

One owner/driver in that case, however, did not rely exclusively on the broker for obtaining work and thus was in a more transitory relationship than the other owner/operators. Nevertheless, and notwithstanding the above distinction that it had drawn, the Board held that this did not take him outside the purview of section 1(1)(ga) of the Act because the owner/drivers were “performing work in the construction sector, an area in which employment relationships have always been less permanent than in the industrial sector”. Using this analogy, the Board held that the transitory nature of the relationship between Fidanza and the broker did not make Fidanza any less a dependent contractor than the other four complainants (see p. 203). Unfortunately, the decision does not specify just how transitory the relationship was in that one instance. We also note that in the cases at bar there is no broker bringing the owner/operators into a cohesive definable group.

13. In *Superior Sand, Gravel and Supplies Ltd.*, [1978] OLRB Rep. Feb. 119, all but one of nine owner/drivers obtained a very substantial portion of their remuneration from the respondent (80%–90%). The one exception derived only 25% of his income from the respondent. Any outside work performed by the owner/drivers usually occurred when work was not available from the respondent. The Board, in concluding that these owner/drivers were dependent contractors, stated at pages 126-7 that:

Taking into account the type and extent of the outside activities of the owner/drivers, indicates that the owner/drivers were not providing service to a number of customers but were *primarily dependent* upon the respondent for their livelihood. Given this type of economic dependence, even the one owner/driver who derived only 25% of his income from the respondent does not appear to be unlike a casual employee. [emphasis added]

14. In the instant cases no one owner/operator is the exception to an overwhelming reliance on the respondent companies. Moreover, in the *Superior* case a haulage agreement signed by *all* owner/operators suggested that an ongoing relationship was intended for all owner/operators. But this is not to say that it is impossible for owner/operators to be economically dependent on more than one person. In *Nelson Crushed Stone*, *supra*, the Ontario Board endorsed the guideline to be applied with respect to the extent of the economic dependency of the ‘contractor’ set out by the Canada Labour Relations Board in *Midland Superior Express Ltd.*, *supra*, (p. 111). In this respect the Canada Board at page 278 wrote:

Surely the test of control to be applied now to the dependency is of an economic nature. Are the persons involved obliged to sell their services in a market in which they are economically dependent on a single *or a restricted few purchasers*? Is their freedom to contract with any degree of independence so thwarted that they are in fact in a status equivalent to that of individual employees faced by powerful employers? One can envisage situations in which a person who would be completely independent from any employer-employee relationship in the common law contractual sense and yet would be absolutely dependent in such an economic sense. [emphasis added]

The possibility of economic dependency co-existing with more than one purchaser of the services in question is also suggested by Professor Arthurs in his landmark article, *supra*, where at p. 114-115 he writes:

Insofar as dependent contractors share a particular labour market with employees, it is submitted, first, that they should be eligible for unionization. Such a result would require a new definition of the term "employee," perhaps along the lines of that adopted in Sweden: "For the purposes of this Act a person shall be regarded as an employee even if no normal engagement exists, provided that he performs work for another person and thereby occupies in relation to that person a position of dependence essentially similar to that occupied by an employee in relation to his employer." Second, courts and labour boards dealing with attempts by organized employees to immunize themselves from the impact of competition from dependent contractors should view this objective realistically. Union standards are as vulnerable to attack from dependent contractors as from non-union employees. Particularly when the law does not yet permit the union to organize the former as it may the latter, defensive and exclusionary tactics should be given some latitude. In this respect the three British Columbia cases – *Morrison*, *Scarr*, and *Therien* – should not be followed.

Where, on the other hand, the dependent contractor does not share a labour market with employees, existing labour relations institutions afford little assistance. Here, special legislation may be required, a precedent for which exists in the Nova Scotia fishing industry. Whether under the aegis of such legislation, or without regard to it, organizations of dependent contractors have emerged. As has been suggested, their legal immunities are far from clear, and require legislative definition. At a minimum, the innocuous section 4 of the Combines Investigation Act should be recast to as to read at least as broadly as section 6 of the Clayton Act:

[T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

15. From the transcript relating to Coreydale, Fedele earned 1.4% of his income; Romano earned 1.6% of his income; and Quaranta earned 3.1% of his income from this company. From Craftwood, Di Savino earned 5% of his income; Polsinelli earned 5.5% of his income; and Facchini earned 15% of his income. The most recent case dealing with economic dependence is *A. Cupido Haulage Limited*, [1980] OLRB Rep. May 679. While it did not address the two exceptions found in *Adbo Contracting* and *Superior Sand*, the panel at page 688 in this case outlined its understanding of the general approach that has been adopted in the vast majority of cases in the following way:

In deciding whether owner/operators who do not employ others on a regular ongoing basis more closely resemble independent contractors or employees, the Board has looked to the source of work. If the owner/operator looks to the quarry for the bulk of his work and does not advertise or otherwise solicit customers on his own, and is generally available during the working hours of the quarry, he is acting more like an employee truck driver than an independent contractor. The Board looks to the percentage of income derived from the relationship under inquiry. If the owner/operator derives a substantial portion of his income from the quarry (the amount ranged from 80% to 100% in the reported cases) he is in a position of economic dependence more like an employee than an independent contractor.

From all of the above, can it be said that the owner/drivers who are the subject of these certification applications are in a position of 'economic dependence' on either Coreydale or Craftwood as that term is employed in the Ontario *Labour Relations Act*?

16. We believe this question must be answered in the negative. Section 1(1)(ga) makes it clear that the issue of economic dependence is in relation to the person for whom the work is done. From the wording used, it is not readily apparent that the Legislature had in mind an "economic dependence" on a vast number of purchasers or on an entire industry. Rather, the words more reasonably reinforce the existing approach of this Board which has measured economic dependence by the degree of economic association with a particular purchaser of the service or work in question. Indeed, it is almost a tautology to speak in terms of dependence on an industry in the sense that almost everyone is dependent on the source of their income when the source is so widely defined. This is not to say, however, that it is impossible to be economically dependent on more than one person and thereby more resembling an employee in relation to each of the purchasers of the services in question. However, the number of such purchasers would have to be very limited and they would have to exercise a *de facto* control over the labour market – an oligopoly in economic terms if you will. The economic relationship with each person would, as well, have to be substantial and more or less regular. On the evidence before us, all of these conditions are absent. The owner/operators subject to these two applications have provided their services to a great variety of purchasers. Some of these purchasers are subject to collective bargaining (although all are not party to the same collective bargaining arrangements); all are not active in the same sectors; and all do not deal with the same trade unions. Others, of course, are unorganized. Indeed, these latter contractors may be in the majority when the two cases are looked at in their totality and against the two collective agreements filed by the intervener. Finally, the economic relationships in all cases are not substantial. For all of these reasons, it is not possible to say that the owner/operators in these two cases are in a position of economic dependence upon either of the two respondent companies.

17. In concluding, we do not seek to ignore the "take it or leave it" pricing of the services. Clearly this is a reflection of unequal bargaining power. However, unequal bargaining power cannot be synonymous with economic dependence as used in section 1(1)(ga). Where supply exceeds demand or where the purchaser possesses a capacity to undertake the service himself, there may not be a great deal of bargaining over the price of the service. Moreover, truck driving and the provision of a single vehicle is not so unique or highly skilled a service that would cause much bargaining over price no matter who the purchaser.

Such services are readily available as the classified ads in any newspaper often attest and a generally uniform price is therefore not unusual. The approach of British Columbia is interesting, but the spread of its effect in that Province is confined to existing collective bargaining arrangements under section 48. Thus, an expansive definition of dependency in that jurisdiction has a definable and ascertainable implication for both labour and product markets. Moreover, while we would agree with the *Fownes* holding that in addressing the issue of economic dependency regard should be had to the nature of the labour market, it would be inaccurate in this case to simply point to the transitory nature of employment in the construction industry and conclude that these owner/operators more closely resemble employees than independent contractors. First, we think the comparison must be with other truck drivers in the construction industry and there is no evidence before us that such drivers are laid off at the completion of each project. In fact, the evidence is quite to the contrary for the two respondent companies at bar. This evidence reflects its own economic reality in the sense that the economic incentive on an employer to keep the investment in his trucks employed demands as continuous employment of his drivers as possible. There was simply no suggestion that the respondent companies experienced a turnover in their regular employees analogous to that experienced with owner/operators.

18. The definition of dependent contractor directs the Board to have regard to two related indicators of an "employment-like" relationship. They are: 1) economic dependence; and 2) obligation to perform duties. With respect to the second indicator, we have already pointed out a number of significant differences between the owner/operators and regular employees. Admittedly, in these two cases they perform similar functions, but not in an equally obligatory manner. While the owner/operator appears to display a "loyalty" to a single project, there was no indication that a failure to attend on any particular day has met with specific sanctions. Moreover, there is absolutely no feeling of obligation that moves the owner/operators to stay with the respondent companies from project to project in a manner similar to their regular employees. The applicant and intervener emphasized the routinized nature of the work, but such is not unusual in relation to this kind of work and cannot be equated to an obligation approximating an employment relationship on the evidence before us. At the most it is equivocal. With reference to the first indicator (economic dependence), the legislation defines a dependent contractor relationship in terms of economic dependence upon a person. This definition amounts to a substantial expansion in the ambit of collective bargaining over the previous approach of this Board reviewed above, but it also contains a restriction or qualification. Prior to the enactment of section 1(ga) it was far from clear that economic dependency, particularly of a more voluntary type, standing alone or together with a related obligation to perform duties entitled a person to employee status under *The Labour Relations Act*. This uncertainty has now been removed in favour of collective bargaining. But if a meaningful interpretation is to be accorded to the term "economic dependence", the relationship between the seller and purchaser of the service or work must be sufficient to create a form of *de facto* control through economic dependency. An employee is considered an employee because control is exercised or can be exercised by the employer. The entire relationship is structured to reflect subservience and obligation. It is a concept both of form and substance. A dependent contractor is a dependent contractor because he lacks control. This lack of control can arise simply out of economic dependence and not from any formal structuring of the relationship by the purchaser of the service or work although the involvement of the purchaser can be a telling fact. Indeed, the purchaser need not exercise any more control than merely continuing to treat with the dependent contractor. The dependent contractor concept is therefore primarily a concept of substance. Form has little role to play.

The mutuality of the employment relationship is, as the cases illustrate, irrelevant. But as the B.C. Board in the *Pacific Press* case observed, the concept must ultimately run up against its legal boundaries. A ruling in favour of the applicants in these two cases would be tantamount to a declaration that an owner/driver of a single truck can never be an independent contractor for the purposes of *The Labour Relations Act*. We decline to take this step given the wording of our mandate. As the Arthurs article indicates, there are many individuals, differently situated, and yet deserving or in need of greater control over their economic environment. However, these circumstances of economic imbalance are highly diverse and not amenable to a single solution. Collective bargaining is one institutional device that can rationalize a broad range of anomalies but the wording employed by the statute and its related purpose must be respected. All of the owner/operators voluntarily adopted their current arrangement to improve their economic position independent of any involvement from the two respondent companies. All exercised the freedom of an independent contractor to provide services to many other purchasers and their resulting mobility reflected initiative. We also wish to make it clear that we are not finding that some or all of these owner/operators are independent contractors in relation to all the companies to whom they provided services. In this respect, we note that in a number of instances a substantial portion of total revenue came from a single or limited source. Where the line of economic dependency is to be drawn in such circumstances may be uncertain from case to case and must be based on a review of all the surrounding evidence. For all of these reasons, the Board finds that the owner/operators subject to these two applications are not dependent contractors within the meaning of *The Labour Relations Act*. Both applications are dismissed.

0970-80-R Service Employees Union, Local 204 affiliated with the A.F. of L., C.I.O., C.L.C., Applicant, v. **Daheim Nursing Home Limited**, Respondent.

Representation Vote—Vote of individual employee disclosed—Employer conduct subsequent to vote causing employee to complain—Whether Board directing new vote

BEFORE: M. G. Picher, Vice-Chairman and Board Members A. Hershkovitz and E.C. Went.

APPEARANCES: *H. Goldblatt for the applicant; A. V. Craig for the respondent; J. P. Wearing for the employee.*

DECISION OF M.G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER E.C. WENT; November 4, 1980

1. On October 24, 1980 the Board conducted a show cause hearing as to why it should not, in the circumstances of this application, conduct a second representation vote. The facts and concerns giving rise to that inquiry are well set out in the following two paragraphs of the Board's decision herein dated October 8, 1980:

1. This is an application for certification in which the Board by a decision dated September 15, 1980, ordered the taking of a representation

vote. The vote was taken on September 30, 1980, and a number of challenges were made concerning the eligibility of certain persons to cast ballots. These ballots were identified and segregated pending a resolution of this dispute. In the discussions following the closing of the poll, the parties were able to reach agreement that only one of the disputed individuals was actually eligible to vote. The ballots were counted, and it was revealed that they were equally divided between those in favour, and those against, representation by the applicant. It was then discovered that, inadvertently, the single segregated ballot which the parties agreed would be counted, had not been placed in the ballot box or included in the count. In the circumstances it was apparent that this ballot would be determinative, and that to count it would necessarily reveal the wishes of the individual employee involved. Nevertheless, the Board officer conducting the vote acceded to the respondent's request that the sealed ballot be opened.

2. Board representation votes are conducted in accordance with strict standards designed to ensure that employees have an opportunity to register a free and untrammelled choice in the selection of a bargaining representative. Employees must be able to cast their ballots under circumstances that are not only free from improper interference, restraint, or coercion; but also from any other elements which might prevent or impede a free and voluntary choice. The secrecy of that choice is of fundamental concern. Form 42, the notice advising employees of the taking of a representation vote, specifically assures them that their ballot will be secret. It would strike at the integrity of the entire process if employees came to believe that, in some circumstances, by agreement of the parties, the choice on their ballots might be revealed. Where the counting of the ballots would disclose the choice made by even a single employee (as, for example, where a single employee's ballot, has been challenged and segregated) the invariable practice of the Board has been to order a new vote (See: *Wm Roberts Electric Ltd.* [1962] OLRB Rep. April 26; *P.C.D. Services Ltd.*, [1963] OLRB Rep. Oct. 392; *Cutler-Hammer Canada Ltd.*, [1965] OLRB Rep. June 200; and *Polmar Tile Co.*, [1970] OLRB Rep. May 206). In the circumstances of the present case the single segregated ballot should not have been opened. The matter should have been referred to the Board for its consideration. The Board is seriously concerned that this was not done. Had the matter been referred to the Board, the Board would have preserved the secrecy of the individual's ballot by ordering a new representation vote, in accordance with the practice affirmed in the cases to which we have referred. The officer had no direction from the Board to open the ballot, and it is our view that the ballot should not be counted in these circumstances. Accordingly, the Board directs the Registrar to schedule a hearing so that the parties will have an opportunity to show cause why, in accordance with the Board's established practice, a new representation vote should not be ordered.

2. At the show cause hearing, Mr. Kenneth Hilge, the employee whose ballot was

revealed, asked that the Board conduct a new vote. He requests the opportunity to exercise his franchise secretly according to the Board's normal practice and in keeping with the understanding conveyed to him by the Board's notice to all employees (Form 42) that each employee's wishes respecting union representation would be expressed by means of a secret ballot.

3. As far as we are aware this is the first time in the Board's history that an employee's wishes have been revealed in this way. That is itself is an indication of the importance that this Board has consistently attached to safeguarding the confidentiality of employees' wishes in the selection of a bargaining agent by means of a secret ballot vote.

4. Strong feelings for and against are not uncommon when a union seeks to be certified as the bargaining agent in a particular work place. No matter which way their sympathies may lie the disclosure of the wishes of individual employees during the certification process can subject them to pressure and recrimination at the hands of their employer and to ostracism at the hands of their fellow employees. That is why the right of confidential selection must remain paramount in the certification process whether it be through the secret ballot or through the confidentiality of membership evidence and statements of employee opposition filed with the Board, expressly protected by section 100(1) of *The Labour Relations Act*. That right must be jealously safeguarded if employees, employers and unions are to retain confidence in the certification process administered by this Board.

5. Counsel for the union argues that the employer's knowledge of Mr. Hilge's previous support of the union will impede his ability to vote freely in a second representation vote. The facts disclose that Mr. Hilge, who is a member of the family that operates the respondent, has been subject to undue pressure from his employer since his ballot became known. It is not unusual to find relatives of management in a bargaining unit of employees, particularly in smaller units such as this one. In many instances an employee related to management may, because of the permanence of family, ties, have less to fear from management in the long run than do other employees. This Board should not lightly conclude that an employee who is a relative of management is incapable of freely expressing his opinion and should therefore be effectively disenfranchised. With respect to the instant application we are satisfied that the isolated family flare-up which occurred would not justify the application of section 7a of the Act and should not, given the specific request of Mr. Hilge, result in this Board endorsing the result of an improperly conducted vote. Having regard to the whole of the evidence, the Board concludes that a second representation vote can be conducted in the circumstances of this case. While the Board in no way condones the conduct of the employer, it is satisfied that Mr. Hilge's rights are adequately protected by the provisions of the Act and that, like the other employees, he will be free to express his wishes on the selection of a bargaining agent within the anonymity of a pool of voters expressing their choice by secret ballot.

6. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

7. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent. To minimize any possible confusion or doubt in the minds of the employees the Registrar is instructed to provide a copy

of this decision to each employee in the bargaining unit by means of ordinary mail sent to his or her home address and to post a copy of this decision on the respondent's premises along with the Form 42 notice to employees of the taking of the vote.

8. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER ALBERT HERSHKOVITZ:

I dissent from the decision of the Board, for the following reasons.

1. A duly authorized vote was taken of all the employees of Daheim Nursing Home Limited. There were a number of segregated votes which were included in the vote resulting in a tie vote. However one of the segregated votes had failed to be counted. As a result of an unfortunate event one of the segregated votes that had not been counted was exposed and showed to have been cast in favour of the applicant union; thus, resulting in an absolute majority in favour of the Service Employee's Union.
2. Subsequently, the Board was in receipt of a letter from Mr. Kenneth Hilge whose vote had been exposed in which he states that because of the exposure of his ballot he has been subjected to undue pressure.
3. He further states in his letter that he is a member of the family that owns Daheim Nursing Home and because of that relationship his position has become untenable and thus requests that a new vote be taken.
4. While one must sympathize with Mr. Hilge's predicament and express my regrets that such an event should have occurred - an event that is entirely contrary to the rules and practices governing the taking of such votes.
5. Nevertheless what has occurred cannot be undone.
6. Because of the actions overt or covert taken by the employer as expressed in the letter by Mr. Hilge it is beyond reason to believe that to order a new vote would result in a true expression of the free choice of the employees.
7. One must assume that the pressure placed on Mr. Hilge is not one that had not become the public knowledge of his fellow workers. As a result of which one must further assume that such expressions and actions on the part of the employer must have a restraining effect on the other employees.
8. As a result of the climate that has been established that union has requested relief on section 7a of *The Labour Relations Act* and grant a certificate.
9. The Board saw fit not to grant such relief.
10. A decision with which I disagree but instead has granted the request and would further issue an order restraining the company from resorting to any punitive action implied or otherwise against any employees.

11. The Board has ordered that another vote be taken. I submit that a vote has already been taken and the free will of the employees was expressed, resulting in a vote in support of the Service Employees' Union. That to order another vote be taken under the conditions that now prevail could not be a true reflection of the wishes of the employees. Such a vote would be taken in an atmosphere of fear of dire consequences that may be imposed on them.

12. Because of the clear expression of the desires of the employees expressed in the previous vote, I would urge that a certificate be granted.

13. As a result of the unfortunate event that occurred, I would urge the Board to undertake stringent measures to ensure that no similar such event occur. The credibility of the Board's action in conducting secret votes must at all times be ensured.

1790-79-U United Steelworkers of America, Complainant, v. Fotomat Canada Limited, Respondent.

Practice and Procedure – Section 79 – Employer not complying with Board order pending judicial review – Whether Board filing order in court – Whether Board staying order until judicial review completed

BEFORE: George W. Adams, Chairman and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *James Hayes, William Mills and George Surdykowski for the complainant and John P. Sanderson Q.C. for the respondent.*

DECISION OF THE BOARD; November 20, 1980

1. By letter dated November 12, 1980 the complainant trade union advised the Registrar of the Board that the respondent company had not complied with any aspect of the Board's order of October 24, [1980] OLRB Rep. Oct. 1397. The order provides:

- (a) Having regard to all of the above circumstances, we have come to the conclusion and so direct that regardless of the outcome of negotiations on the issuance of this order, striking employees should be given the opportunity to make an unconditional application to return to work on or before December 1, 1980 and if such application is made by any striking employee the respondent shall reinstate the said employee to his former position whether or not a strike replacement employee must be transferred, laid-off or terminated.
- (b) The Board declares that the respondent failed to bargain in good faith and make every reasonable effort to make a collective agreement by withdrawing its monetary proposals by its letter dated June 17, 1980.

- (c) The Board further declares that the respondent failed to bargain in good faith and make every reasonable effort to make a collective agreement in adopting the position that it did on union security on and about February 25, 1980 and March 3, 1980.
- (d) The Board directs the respondent to bargain in good faith and make every reasonable effort to make a collective agreement. To this end, the Board specifically directs the respondent, on the receipt of this decision, to convene forthwith a series of bargaining meetings between itself and the complainant with the assistance of a Ministry of Labour mediator and, at the initial meeting, to resubmit for the complainant's consideration the entire offer made to the complainant on or about February 25, 1980 including the monetary proposals that it unlawfully withdrew on June 17, 1980.
- (e) The respondent is directed to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places at all its places of business where bargaining unit employees are employed in Ontario, including all places where notices to employees are customarily posted and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant trade union to satisfy itself that this posting requirement has been and is being complied with.
- (f) The respondent is directed, at its own expense, to mail a copy of the attached notice marked "Appendix" after being duly signed by the respondent's representative to the residence of each employee in the said bargaining unit forthwith.
- (g) The respondent is further directed to pay to all bargaining unit employees all monetary losses that the complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate a collective agreement due to the unlawful conduct of the respondent, the said damage, if any, running to the date of the first meeting convened by the respondent in accordance with paragraph (d) of the Board's order, together with interest as appropriate.

2. By letter dated November 10, 1980 Mr. F. von Veh, on behalf of the respondent company, advised the counsel for the complainant trade union that "the matter should be reviewed by the courts" and that "at the present time that we do not concur with the position of your client that the Board's orders should be enforced forthwith."

3. Subsequently, Mr. von Veh took the position on behalf of the respondent outlined in his letter to Mr. Hayes dated November 14, 1980. It reads:

We have now had an opportunity to fully review the decision of the Board in the above-noted matter dated October 24, 1980 and, in view of the Board hearing herein scheduled for Wednesday, November 19th, would propose that the Order of the Board be implemented on the following basis:

- 1.) Insofar as paragraph (d) is concerned, we have contacted the Director of Mediation and Conciliation, Mr. Jack Speranzini, and have been advised that it would be possible to schedule a meeting with the Mediator appointed in this matter, Mr. Harry Sparling, on one of the following days which would also be suitable to the undersigned, namely, Tuesday, November 25th, Tuesday, December 2nd or Wednesday, December 3rd.
- 2.) We have been instructed by our client to institute judicial review proceedings in relation to paragraph (a) of the Order of the Board.
- 3.) We are prepared, in relation to paragraphs (e) and (f) of the Order of the Board to post and mail notices, respectively, with paragraph (1) deleted and with a proviso in paragraph (3) excluding the Warden Avenue bargaining unit pertaining to route drivers and maintenance employees.
- 4.) In view of the declaratory nature of paragraphs (b) and (c) of the Order of the Board, no action on the part of our client is required.
- 5.) In relation to paragraph (g) of the Order of the Board, it is the position of our client that this matter will be resolved in due course pending the outcome of continuing negotiations and pending the ultimate outcome of judicial review proceedings to be instituted as above-noted.

It is hoped that the aforementioned proposals will alleviate the necessity of attending before the Board on Wednesday, November 19th.

We also wish to advise you that Mr. Lorne Morphy, Q.C., has been retained in relation to judicial review proceedings – would it be in order for you to accept service on behalf of your client in relation to the necessary documents which have to be served?

I hope to hear from you soon on the within proposals.

4. At a hearing before the Board Mr. Sanderson requested the Board to “stay” that portion of its order relating to the reinstatement of striking employees until the application for review has been dealt with by the courts. He also sought an amendment to the Board’s notice to this effect prior to the posting and mailing of the notice by the respondent company. On behalf of the complainant trade union it was argued that status of the striking employees was integrally related with the other aspects of the Board’s order and that the efficacy of this bargaining relationship would be seriously impaired by the delay involved in an application for judicial review. A “stay” was, therefore, vigorously opposed.

5. Alternatively, counsel for the respondent submitted that only one employee had applied for reinstatement under the Board's order and that therefore the respondent was not in breach of the Board's order in this respect.

6. The Board gave an oral ruling at the hearing which we now set out *in amended* form.

7. On the basis of the submissions of the respondent's counsel and the respondent's letter of November 14, 1980, we are satisfied that the respondent has no intention of complying with paragraph (a) of the Board's order until its application for judicial review has been heard by the courts. To be fair, counsel did say that the respondent's position might change depending on the number of applications received before December 1, 1980, but its general position is contrary to the order at this time. Indeed, the respondent did not indicate it had reinstated the lone striking employee who has already applied. It is clear law that the mere filing of an application for judicial review does not automatically stay the order of an administrative tribunal, at least under *The Labour Relations Act*. See *Re International Woodworkers of America and Patchogue Plymouth Hawkesbury Mills* (1976), 14 O.R. (2) 118; *Frito-Lay Canada Limited*, [1978] OLRB Rep. Sept. 831. It is also beyond dispute that the respondent has not posted or mailed the notices detailed in the Board's order as directed, although this inaction relates to its concern about the propriety of paragraph (a) of the Board's order. In such circumstances, and for the purposes of section 79(5), it can be said that the respondent company "has failed to comply with [at least some of] the terms of the [Board's] determination." It is also beyond dispute that the respondent made its efforts to convene the directed bargaining sessions only after the period of time stipulated by section 79(5) of *The Labour Relations Act*.

8. Section 79(5) of *The Labour Relations Act* provides:

Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

While at the hearing the Board advised the parties that its finding of non-compliance would be confined to paragraphs (a), (e) and (f) of the Board's order and that we would register only these portions of the order, we are now of the view that section 79(5) requires that a copy of the entire determination, exclusive of reasons, be filed in the office of the Registrar of the Supreme Court even where only a part of the said determination is not complied with. One assumes that this is to permit the Court to see the complete order and consider its various inter-relationships, if any. We are also of the view that while the respondent company has now begun to act on paragraph (d), it was in non-compliance of this paragraph on the date the complainant trade union requested this hearing and complained about compliance. We have

therefore decided to file our entire order with the courts because of the wording of section 79(5) and because, at one time or other, the respondent has failed to comply with all aspects of the Board's order. The complainant can seek enforcement of portions of the order that the respondent continues to refuse to submit to. The mere filing of this determination with the Court does not result in automatic enforcement to the prejudice of the respondent. See also *The Statutory Powers Procedure Act, 1971*, S.O. 1971, c. 47, section 19(1).

9. In addition, we wish to make it clear to both parties that our findings of October 24, 1980 apply to the Warden Avenue location of the respondent and that the Board's order, in its entirety, pertains to that location.

10. As for the respondent's request for a "stay" of paragraph (a) of the Board's order, we seriously question whether we have such jurisdiction under section 79(5), a section which seems to speak in mandatory terms. However, even if we construe this request as being one seeking reconsideration of the Board's order, we do not think the circumstances warrant an alteration or amendment to the Board's determination. We accept that the ongoing collective bargaining between the parties and the viability of the subject bargaining units cannot be divorced from the job rights of the striking employees. A substantial delay in compliance with the order as it affects these employees is, in our opinion, likely to further undermine the collective bargaining rights of the complainant trade union and make academic the earlier proceedings on which our order is based.

0361-80-R Ontario Public Service Employees Union, Applicant, v. Hôpital Montfort, Respondent, v. Group of Employees, Objectors

Appropriateness – Bargaining Unit – Whether paramedical employees employed in a professional capacity excluded from broader paramedical unit – *Stratford General Hospital* case considered

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members J.A. Ronson and W.F. Rutherford.

APPEARANCES: *S.M. Grant, P. Murray and P. Anidjar for the applicant; L. Aubry for the respondent; L. Greenspon for the Group of Objectors.*

DECISION OF THE BOARD; November 25, 1980

1. The name "St. Louis De Montfort Hospital" appearing in the style of cause of this application as the name of the respondent is amended to read: "Hôpital Montfort".

2. This is an application for certification.

3. By a decision dated June 4, 1980 the Board directed the taking of a pre-hearing representation vote. In the face of two challenges made to the composition of the bargaining

unit, the Board ordered that the ballots of those in dispute be segregated and that the ballot box be sealed pending the resolution of the matters in question.

4. The first challenge was made by the Hospital and relates to the employment status of Mr. Roger Favreau, the Chief Electroencephalograph Technician.

• • •

[The reasons for finding that Mr. Favreau does not exercise managerial functions and is not employed in a confidential capacity in matters relating to labour relations are omitted]

19. We turn now to the second challenge in this application. A group of objecting employees disputes the appropriateness of the bargaining unit applied for by the union and asserts that they should be carved out of the proper unit.

20. The union has applied to represent all paramedical employees of the respondent employed in the City of Ottawa save and except department heads, assistant department heads, persons above the rank of department head and assistant department head and persons covered by subsisting collective agreements. The respondent agrees with the union's proposed bargaining unit. The group of objectors, however, contends that they should not be included in the unit. The classifications of the objectors include pharmacists, physiotherapists, dieticians, social workers and psychologists. They fall into what was broadly described in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459 as paramedical employees employed in a professional, as opposed to technical, capacity. The objecting employees contend that as professional paramedical employees they should not be included in the same bargaining unit as technical paramedical employees. In the petition submitted to the Board they stated that their job duties, working conditions, skills and training were sufficiently distinct from those of the paramedical employees employed in a technical capacity that they should not be included within the same bargaining unit.

21. In *Stratford General Hospital, supra*, the Board addressed the question of the appropriate bargaining unit for paramedical employees in a public hospital. In that case, the applicant union, OPSEU, had applied to represent a unit of all paramedical personnel, similar to the unit applied for in this case. Another union, however, Association of Allied Health Professionals (AAHP), applied to represent a less comprehensive bargaining unit composed, in general terms, of paramedical employees employed in a professional capacity. The respondent Hospital endorsed the single unit proposed by OPSEU.

22. Prior to its decision in *Stratford General Hospital*, the Board had not developed a definitive policy with respect to paramedical hospital employees. *Stratford General Hospital* was the first case where nearly all of the groups having an interest in this question were present. In these circumstances the Board broadly described the issue before it as the appropriateness of one or two paramedical bargaining units for the purposes of collective bargaining in the public hospital sector. In making its determination in *Stratford General Hospital*, therefore, the Board established broad organizational guidelines giving direction to parties for the future.

23. After an extensive analysis of all of the occupations in question, the Board

concluded that the appropriate unit was the single paramedical unit covering both professional and technical employees. At pp. 495-496, the Board set forth the basic principles the Board utilizes in deciding the appropriateness of bargaining units:

Another point worth making at the outset is the inherent tension between the Board's responsibility to fashion practical bargaining structures and the equally important concept of freedom of association expressed in section 3 of *The Labour Relations Act*, R.S.O. 1970, c. 232, as amended. In *Ponderosa Steak House*, [1975] OLRB Rep. Jan 7 the Board expressed this relationship well in writing:

A primary theme set out in *The Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. . . .

In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining". In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization

The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. . . ."

24. Pursuant to determining whether one or two paramedical bargaining units would be appropriate for the purposes of collective bargaining in the public hospital sector, the Board at pp. 496-502 evaluated the distinctions between the two groups of paramedical employees, distinctions which AAHP argued would justify two paramedical bargaining units:

The broadest principle of bargaining unit demarcation suggested in this case was a "professional/technical" distinction Thus the first step in our decision is to see if this distinction reflects a significant difference between the two groupings proposed and assess whether it results in a practical bargaining unit demarcation. . . .

Applying only these criteria to the facts at hand, we find that all of the occupations might merit the designation professional to a lesser or greater extent. All of the occupations require a not insignificant period of post-secondary education in a specialized institution that passes on the competence of a graduate, although important differences in the length and nature of training between occupations undoubtedly exist. Further, all the occupations are represented by associations that have promulgated codes of ethics to which members subscribe. As well, the associations have played important roles in the establishment of training programmes...

Therefore, while this initial and generalized approach to the professional/technical dichotomy sheds some light on the competing interests that underlie this case, it does not reveal sufficiently distinct differences to support the request of AAHP. Indeed, if anything these two general criteria are supportive of the OPSEU application.

In becoming somewhat more specific...we find [Wilensky's] observation that there is a "process of professionalism" which some occupations complete and thereby come to be recognized as "professional" occupations very interesting...

It can be seen that all the occupations appear to be proceeding along this so called "process to professionalization" and after reviewing each occupation's progress we are of the opinion that specific points along the process do not provide a clear enough demarcation for bargaining unit determination purposes...

...But while general claims of professionalism do not, in our opinion, support two bargaining units, counsel to AAHP and many of its witnesses stressed the fact that the occupations sought to be represented by AAHP have direct contact with the patient; are treatment oriented; belong to the health care team; and exercise independent judgment. In effect these arguments really attempt to tailor the concept of a professional occupation to the health care industry. At the same time they get away from the qualifications of an employee and focus more on what the employee does. However after careful consideration we have concluded that these considerations neither alone nor collectively, provide a sufficiently clear line of demarcation...

We now wish to examine the term paramedical. The term is worth considering because it is a term by which many appear to allocate occupations in this field...and secondly, because we think it does not provide the most relevant common denominator. Eliot Friedson... writes:

"The term "paramedical" refers to occupations organized around the work of healing which are ultimately controlled by physicians...

These characteristics are such that the paramedical occupations may be distinguished from established professions by their relative lack of autonomy, responsibility, authority, and prestige. . ."

We think Friedson's observations capture some of the most salient characteristics shared by the occupations affected by this application. The evidence clearly demonstrates that all the occupations are organized around the medical profession, and despite the ethical stance taken by some of the witnesses, we are satisfied that all the occupations are subordinate to that profession. They perform their work at the request of a doctor and the work to a greater or lesser extent is monitored by a doctor. . . The Board is also satisfied that all occupations are integrally related to the treatment process and while there may not be significant direct contact between all the occupations in the two groupings proposed by AAHP, all of the occupations sought to be represented by AAHP rely upon information and analysis provided by many of the other occupations and must be fully familiar with the significance of their activities. Therefore, in this sense there exists a functional interdependence between the activities of the two groups of occupations.

These common characteristics aside, the Board's aversion to fragmentation or preference for a more comprehensive bargaining unit cannot be ignored. . . in the case at hand we have not found that we are confronted by two otherwise appropriate bargaining units but rather we view the fragmentation proposed by AAHP as another indication of inappropriateness. (See *Corporation of the Township of Markham* [1969] OLRB Report August 592).

25. On the basis of the above analysis, the Board in *Stratford General Hospital* concluded that one comprehensive bargaining unit, including paramedicals employed in both a professional and technical capacity, was the appropriate bargaining unit.

26. In the instant case, counsel for the employee objectors stated that the evidence the objectors could present on the duties and responsibilities of the people in the classifications involved would mirror the evidence presented in *Stratford General Hospital*. Accordingly, he did not attempt to distinguish *Stratford General Hospital* on facts of this kind.

27. Further, counsel for the objectors did not argue that the unit applied for by the applicant union in this case was inappropriate. He conceded that if the objectors were seeking certification for themselves as a separate bargaining unit then, on the basis of *Stratford General Hospital*, one comprehensive unit would be appropriate. Counsel placed his argument on the footing that unlike the situation in *Stratford General Hospital*, the professional paramedicals involved in this application do not want to be represented by any union at all. Counsel argued that section 3 of *The Labour Relations Act* guarantees to every person the freedom either to join or not to join a trade union. On this basis, counsel stated that the Board should give effect to what he said was the unanimous desire of the professional paramedicals at Hôpital Montfort not to be represented by any trade union by carving them out of the proposed unit. We should note at this point, however, that the petition from the objectors dated March 17, 1980 did not state that the employees didn't want to be represented by a union

but rather that they did not want to be included in a bargaining unit with paramedical employees employed in a technical capacity.

28. As recognized by the Board in *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7 and as reflected in section 6(1) of the Act, the Board in determining the appropriate bargaining unit, may ascertain and give weight to the wishes of employees as to the appropriateness of the unit. Specific examples of when the Board would conduct a vote to determine the wishes of the majority to decide the bargaining unit in question may be found in sections 6(3) and 6(4) of the Act. Section 6(3) stipulates that a unit of professional engineers shall be deemed by the Board to be appropriate but that if the majority of the professional engineers want to be included in a bargaining unit with other employees then the Board may so include them. Section 6(4) of the Act establishes the same situation for dependent contractors. As well, section 6(2) of the Act states that certain craft units shall be found by the Board to be appropriate. The Act, however, does not contain a similar provision for paramedical professionals. Furthermore, even in these sections relating to professional engineers and dependent contractors, the Board does not base the appropriate bargaining unit determination on the question of whether or not they wish to be represented by a union in the first place but rather on their wishes with respect to the scope of the bargaining unit.

29. Within the contemplation of *The Labour Relations Act* every employee is free to participate in the decision as to whether or not he will be represented by a trade union. When the representation vote was taken in this case on June 18, 1980, all of the professional paramedical employees who voted exercised this right. At that point they were provided with an opportunity to choose whether or not they wanted to be represented by OPSEU. Their collective voice may have greater or lesser strength depending on their numerical position in the bargaining unit found by the Board to be appropriate. The fact that they may voice an opinion different from others in the bargaining unit does not of itself justify the establishment of a separate bargaining unit. As the Board noted in *Stratford General Hospital*, that would conduce to fragmentation that would undermine collective bargaining in the public hospitals. Moreover, the fact that when the vote is counted the professional employees may not have supported a majority in favour of the union would not make their situation any different from that of any minority in a democratic process. More importantly, it should not affect the merits of a determination as to which unit of employees is appropriate for the purposes of sound and viable collective bargaining.

30. In *Stratford General Hospital* the Board gave full consideration to the arguments and views of all the groups before it including paramedical employees employed in a professional capacity. The Board not only concluded that one comprehensive unit was appropriate but expressed the opinion that the smaller unit of professionals would be inappropriate in view of the fragmentation it would cause. It would follow on the same reasoning that in this case a smaller unit of paramedicals employed in a technical capacity would similarly cause undue fragmentation. In *Windsor Western Hospital Centre Inc.*, [1979] OLRB Rep. May 463 the Board endorsed the conclusion in *Stratford General Hospital* that one comprehensive unit was appropriate. The Board in *Windsor Western Hospital* reached this conclusion notwithstanding the fact that it had stronger evidence on the question of professionalism from the objecting psychologists and psychometrists than was apparently before the Board in *Stratford General Hospital*.

31. Consistent with its decision in *Stratford General Hospital* and *Windsor Western*

Hospital, the Board concludes in this case that the comprehensive paramedical unit applied for by the applicant union is the unit appropriate for collective bargaining. The Board therefore dismisses the claim of the objecting employees that they be carved out of the unit applied for by the applicant union.

32. The Board directs, therefore, that all segregated ballots be mixed in with the rest of the ballots in the ballot box and that all ballots be counted.

33. The matter is referred to the Registrar.

2052-76-R Labourers' International Union of North America, Local 183, Applicant, v. **Kaneff Properties Limited**, Respondent

Evidence – Practice and Procedure – Credibility issue arising in examiner's hearing – Whether Board suspending examiner proceedings to hear evidence directly
(This case has recently come to the attention of the editor and is of sufficient importance to be published at this time)

BEFORE: M. G. Picher, Vice-Chairman, and Board Members H. J. Ade and H. Simon.

APPEARANCES: *Brian G. Yandell, Thomas Kuttner and Stephen Wahl for the applicant; W. G. Phelps and Lo Heath for the respondent.*

DECISION OF THE BOARD; June 16, 1977

1. The name: "Kaneff Properties Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "Kaneff Properties Limited".

2. This is an application for certification which has been referred by the Board to a Labour Relations Officer to conduct an examination into, among other things, the duties and responsibilities of resident superintendents employed in the respondent's apartment maintenance business. The respondent submits that persons classified as resident superintendents are to be excluded from the bargaining unit as managerial.

3. The respondent has requested that the examiner's proceedings be interrupted and that the Board itself hear the respondent's cross-examination of a resident superintendent, Eric Dischleit, on the grounds of Mr. Dischleit's credibility. It also requests that the Board hear *viva voce*, the testimony of witnesses that the respondent intends to call to contradict the testimony that Mr. Dischleit has given thus far as well as the testimony he will give in cross-examination.

4. The authority of the Board to delegate to its examiners and Labour Relations Officers the power to conduct examinations respecting the duties and responsibilities of individuals or classes of persons, and to conduct examinations respecting the appropriateness of the bargaining unit generally, is found in section 92 of the Act which provides, in part:

92(2) Without limiting the generality of subsection 1, the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;
- (c) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not;
- (g) to authorize any person to do anything that the Board may do under clauses *a* to *f* and to report to the Board thereon;

5. By enacting those sections the Legislature has allowed this Board the facility to respond expeditiously to the needs of parties involved in the collective bargaining process. The concern for expedition in certification proceedings is well established (see *Nick Masney Hotels Ltd.* (1970), 70 CLLC ¶14,020 (Ont. C.A.); *Trench Electric Limited*, [1979] OLRB Rep. Apr. 170; *York University* [1976] OLRB Rep. Apr. 187 at 192). Against the need for expedition, the Board must weigh the need for the opportunity to hear all relevant evidence. The procedure of taking evidence before an officer designated by the Board, then providing a report to the Board and the parties in the form of a verbatim transcript of that evidence and allowing all parties the opportunity to make oral submissions on the evidence directly to the Board is the formula, consistent with section 92 of the Act, which has been arrived at to accommodate both of those interests.

6. The kind of evidence required for a determination of whether persons are managerial or are employed in a confidential capacity in relation to labour relations, or whether certain classes of employees have a separate community of interest is frequently lengthy and detailed. It would bring the business of the Board to a standstill if evidence of that kind must always be heard *viva voce* by the panel seized of the application for certification. There is, of course, nothing to prevent the Board itself from hearing that evidence, but it is obvious that it will do so only in an appropriate case. Moreover, wherever appropriate, the Board may allow either party to adduce additional evidence at the hearing which is convened to receive the oral representations of the parties on the officer's report.

7. In his written request to the Board, counsel for the respondent submits that the normal procedure is inadequate in that the credibility of Mr. Dischleit is in issue. He argues that inasmuch as the testimony before the officer is not given under oath, and the Board does not have the opportunity of first-hand observation of the demeanour of the person examined, the Board should itself hear, under oath, the testimony of this witness as well as the testimony of those witnesses who will be called to contradict his evidence.

8. We do not agree. Often as not there will be an issue of credibility of greater or lesser degree in any proceeding where the testimony of two witnesses is in conflict, or where the testimony of one witness, taken alone, contains inconsistencies and contradictions. And that is likewise to be expected of testimony before a Board examiner that reaches the Board in the form of a transcript.

9. The legislative scheme that permits examination before an officer of the Board

contains an implicit recognition that matters of credibility can, in some case, be apparent and be resolved on the face of a verbatim transcript. In those cases the Board may confine itself to the transcript of evidence and dispose of issues of that kind by weighing items of conflicting evidence in the light of all of the testimony given. It is the Board's experience that contradictions and inconsistencies can be detected in a verbatim transcript no less than in *viva voce* proceedings of any length where the Board must rely on its own notes. Usually the Board will be able to resolve issues of credibility by close scrutiny of the transcript, frequently assisted by the later oral submissions of the parties, if any, on its contents.

10. Normally it is only where the evidence stands in apparent equilibrium and the Board remains in substantial uncertainty about which parts of it should be accepted or rejected that recourse should be had to an examination of the demeanour of the witness in direct testimony before the Board. That may be ordered at any time subsequent to the filing of the completed examiner's report.

11. Counsel for the respondent submits that the freshness of cross-examination will be lost if a witness whose credibility is challenged must be cross-examined a second time before the full panel of the Board. He argues that on the second time around the witness will be prepared for the questions to come so that cross-examination will be less likely to demonstrate the weakness of his testimony. As valid as that suggestion may be, it describes a situation no different from what happens any time this Board hears evidence anew on reconsideration or any time a court hears testimony in a trial *de novo* from a witness who testified to the same facts in earlier proceedings.

12. Viewed in the light of the above considerations, the respondent's request is, in these circumstances, premature. It may well be that when the testimony of the witness in question is read in the context of the entire transcript of the examiner's report, the Board will have no need to observe first-hand the physical appearance of the witness to assign value to his testimony. And if, upon receipt of the completed report, it can be shown that a whole or partial re-examination of that witness or other witnesses *viva voce* before the Board is in order, it will be open to the respondent to make its request at that time. It is then that the Board may properly be called upon to decide whether the particular circumstances of the case dictate that the interests of expediency must be subordinated in order to permit a more thorough scrutiny of the evidence. To follow the course requested by the respondent at this stage of the proceedings would tend to interrupt and, to that extent, undermine the value of the examiner's hearing, an expedient that is vital to the certification process.

13. For all of the above reasons, the respondent's request is denied. The examiner is instructed to continue forthwith with the examination. We would add that the Board does not agree with the applicant's submission that in view of its request the respondent should be deemed to have waived its right to cross-examine Mr. Dischleit.

1482-79-R Retail Clerks Union, Local 206, Chartered by the United Food and Commercial Workers International Union, Applicant, v. **Kitchener News Company Limited**, Respondent, v. Group of Employees, Objectors

Membership Evidence—Form 8 declarant not engaging in proper inquiry—Form 8 declaration requiring either personal knowledge or knowledge obtained after inquiries—Not supporting membership evidence

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members F. W. Murray and B. K. Lee.

***APPEARANCES:** Ted Wohl, Randy Levinson and Betty Henry for the applicant; W. Challis and R. McKeag for the respondent; No one appearing for the objectors.*

DECISION OF THE BOARD; November 1, 1980

1. This is an application for certification in which there are a number of issues in dispute between the parties; however, we have found it necessary to deal with only one.

2. In support of its application for certification the applicant union filed documentary evidence of membership in the form of cards, each of which consists of a combination application for membership and an attached receipt. A prospective member is required to sign both portions so that the membership document will properly meet the requirements of section 1(1)(j) of *The Labour Relations Act*. There is also a space where the “collector” must sign to confirm both the employee’s signature, and the receipt by the “collector” of the union’s initiation fee. The union filed 11 such membership documents. The documents were solicited by more than one “collector”. This membership evidence was supported by a duly completed Form 8 statutory *Declaration Concerning Membership Documents* signed by Betty Henry a trade union official. Paragraph 3 of this statutory declaration provides as follows:

“(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:” [emphasis added]

3. A potential problem with the Form 8 Declaration surfaced during an examination of the circumstances surrounding the solicitation of the membership card of Joe Solazzo. Mr. Solazzo’s membership card is signed in the two places as required, and the confirming collector’s signature is that of Wendy Woods. Ms. Woods, however, was *not* the person who

witnessed Solazzo's signature or collected a dollar from him. Ms. Woods apparently pre-signed the membership card, which was subsequently given to Pat Lichty. It was Ms. Lichty who actually solicited Mr. Solazzo's support and, it appears, collected the required dollar payment from him some days later. Ms. Lichty returned the card to Ms. Woods with a dollar of her own. Ms. Woods, in turn, gave the card to Betty Henry, so that it could be included with the other cards supporting the union's certification application. There is no evidence of any inquiry by Ms. Woods of Ms. Lichty concerning the manner in which Solazzo's card was solicited, nor is there evidence of any inquiry by Ms. Henry with respect to this matter. None of the witnesses could recall such inquiries being made.

4. Betty Henry was called to give evidence concerning the extent of her inquiries prior to signing the Form 8 Declaration. It should be noted, moreover, that Ms. Henry was "collector" for only seven of the cards tendered in evidence. There were other collectors for the other cards, and consequently in order to fulfill the requirements of paragraph 3 of Form 8 it would have been necessary for Ms. Henry either to have been present when the other cards were signed, or to have made the inquiries concerning the circumstances in which they were signed. The evidence before the Board disclosed neither.

5. Ms. Henry testified that she had no recollection of making inquiries concerning the Solazzo card, nor was it her practice to make such inquiries in every case prior to signing the Form 8 Declaration. She indicated that she made efforts to train employees, and impressed upon them the necessity of soliciting membership evidence properly; but, having done so, she relied on this training rather than on her own inquiries when she signed the Form 8 verifying that the membership evidence was proper. As the case of the Solazzo card indicates, this was not necessarily the case, and this irregularity might well have been revealed had Ms. Henry undertaken the inquiry contemplated by paragraph 3 of the Form 8 declaration.

6. The knowledge which is required as a precondition to signing the Form 8 Declaration was outlined by the Board in *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan. 738 at paragraph 13:

"It is readily apparent that a person completing Form 9 (now Form 8) must be seized with some type of knowledge in order to satisfy the requirements of item 3 cited above. This knowledge may be personal knowledge (i.e.) knowledge gained by either acting as the actual collector or knowledge gained by being personally present and actually witnessing the transaction between the collector and the member wherein the membership card was signed and payment of money made by the member to the collector.

The other type of knowledge which is acceptable is that knowledge gained from inquiries made of the persons who actually acted as collectors, or the persons who made the necessary inquiries of the actual collectors.

The requirement that inquiries be made is obviously not an onerous one or one that imposes an undue burden on the applicant; however, the requirement is that *inquiries be made*.

In order that inquiries be meaningful it is obvious that they must be made after the event. Instruction given to collectors prior to the signing of members may be helpful or necessary in the carrying out of an organizing campaign, however, such instructions do not obviate the necessity of making the inquiries required for the proper completion of Form 9 (now Form 8). (See Dominion Stores Limited case, [1964] OLRB Rep. Dec. 447).

In the instant case, Mr. Storey, prior to completing Form 9 (now Form 8) made inquiries of Mr. Cooke. However, Mr. Cooke had made no inquiries of Mr. Griffin and in turn Mr. Griffin had made no inquiries of other persons who had acted as collectors. It is readily apparent that the inquiries made by Mr. Storey were made of a person who had no direct knowledge of the collectors and the failure of Mr. Cooke and Mr. Griffin to make inquiries frustrated the purpose of Mr. Storey's inquiries. Where the officers of an applicant trade union have themselves frustrated the inquiries made by the person who completes Form 9 (now Form 8) and by their failure to follow through with their own inquiries, render the inquiries made by such persons meaningless, we must find that Form 9 (now Form 8) in such circumstances cannot serve the purpose for which it was intended and in such circumstances is a nullity. In arriving at this conclusion, the Board has noted with approval the *Valley Transportation Company Limited* case, [1963] OLRB Rep. Nov. 448, wherein the Board said at p. 452:

'The Board must expect and insist that persons who file applications for membership cards and receipts and Form 9 (now Form 8) as evidence of membership, take all necessary precautions and care to ensure that the information contained therein is true and accurate. The Board is entitled to demand the highest standards of integrity, disclosure, and accuracy on the part of those who submit such evidence and where undisclosed inaccuracies of material facts are later brought to its attention, to take a strict view of them.'" [emphasis added].

7. The standard enunciated by the Board in *National Steel Car*, *supra*, has been consistently applied in other cases in which the same issue arose. It is a standard which is well known in the labour relations community, and the cases on point are legion (see for example: *Puretex Limited*, [1972] OLRB Rep. June 676 and cases cited therein; *Stanley Steel Company Limited*, [1972] OLRB Rep. Feb. 181; and *N. D. Supermarket Limited*, [1976] OLRB Rep. March 112; *Triad Triumph Limited*, [1976] OLRB Rep. March 115; *Country Village*, [1976] OLRB Rep. July 373; *The Alexandra Hotel Limited*, [1972] OLRB Rep. Nov. 963; and more recently *Trent Valley Lodge Limited*, [1980] OLRB Rep. June 926). The purpose of the Form 8 inquiry (and the "second check" that it builds into the system) is equally clear. The Board must place total reliance on documentary evidence—written hearsay, often solicited by inexperienced laymen, yet not revealed to the employer or subject to cross-examination (see section 100 of the Act). On the basis of that evidence, a trade union may be certified as the employees' bargaining agent without recourse to a representation vote. Indeed, unless some specific irregularity is brought to the Board's attention, the Board will normally

place total reliance on the Form 8 Declaration and will not undertake any formal inquiry concerning membership documents which appear to be regular on their face. In the present case, for example, the Form 8 problem would never have come to light had it not been for the disclosure of an irregularity which would not have been apparent on the face of either the Form 8 Declaration or the membership card itself. To avoid such problems, the Board has always held that the person signing the Form 8 must be meticulous and comply strictly with its requirements.

8. Ms. Henry's evidence amounts to this: that she has no specific recollection of making any inquiry concerning a card which is clearly irregular, and that it was her practice to rely on proper training of employee collectors rather than, in each case, making specific inquiries of them, after the fact, concerning the manner in which their cards were collected. In other words, the evidence indicates that the required inquiries were *not* made, and accordingly the Form 8 Declaration can only support those membership documents which Ms. Henry solicited herself. This conclusion is not intended to impugn Ms. Henry's integrity, or suggest that she has intentionally sought to mislead the Board. We believe that she merely misconstrued the nature and extent of the inquiry required of her. The Board must find in the circumstances of this case, however, that the membership evidence solicited by persons other than Ms. Henry herself is not supported by the Form 8, does not meet the strict standard required by the Board, and consequently, should not be considered.

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11. The application is dismissed.

**0440-80-U Mechanical Contractors Association Ontario, Applicant,
v. United Association of Journeymen and Apprentices of the Plumbing
and Pipe Fitting Industry of the United States and Canada, Local 463,
and C. Burrows, Respondents**

**Construction Industry – Strike – Nature of province wide strike – Whether separate
strikes contrary to section 134a**

BEFORE: R. A. Furness, Vice-Chairman.

DECISION OF THE BOARD; November 19, 1980

1. In a decision dated June 4, 1980, [1980] OLRB Rep. June 848, the Board issued a direction pursuant to section 123 of *The Labour Relations Act* after finding that the respondents had violated section 134a(1) of the Act in that they had called or authorized an unlawful strike in the industrial, commercial and institutional sector of the construction industry. The respondents and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the "Council") have requested that the Board reconsider and revoke its decision

dated June 4, 1980. In addition, the Council has asked that the Board schedule a hearing in order that it might attend and make full representations in support of its request.

2. The hearing in this matter was held on June 2, 1980. Having regard to the importance of the issue in this application, the hearing was remarkably short. The entire hearing lasted one hour and forty minutes and two witnesses were called to give evidence. The argument of the applicant and the respondents was delivered in ten minutes. It has not been alleged that new evidence is now available which was not available at the time of the hearing. Moreover, it has not been suggested that the arguments which have been raised in these requests for reconsideration and revocation pursuant to section 95(1) of the Act could not have been made at the time of the hearing. In these circumstances, the Board is not prepared to schedule a hearing as requested by the Council.

3. The Council was not named as a party in this application. However, the applicant and the respondents have not raised any objection to the Council making representations to the Board. The Board is prepared, having regard to the importance attached to the decision dated June 4, 1980, by the respondents and the Council, to consider the representations before it.

4. The respondents have argued that the Board, in its interpretation of section 134a of the Act, has amended that section so as to correct what the Board perceives to be deficiencies of that section. It is not the function of the Board either to amend the Act or to respond to what is perceived by the respondents to be deficiencies in a section of the Act. It is the function of the Board to administer the Act and interpret the provisions of the Act.

5. The Board now considers the representations of the respondents. In considering whether the Board has placed a reasonable and justified interpretation on section 134a, it is necessary to consider the Act as a whole. The literal meaning of a particular section may in this way be extended or restricted by reference to other sections and to the general purview of the statute. See *Halsbury's Laws of England*, Third Edition, Volume 36, pp. 394-395; and *E. Gagnon et al v. Foundation Maritime Limited*, [1961] S.C.R. 435; 28 D.L.R. (2d) 174. In addition, *The Interpretation Act*, R.S.O. 1970, c.225, provides in section 10 as follows:

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

The intent of this section has been recognized by the Supreme Court of Canada in *Bakery and Confectionery Workers International Union of America Local No. 468 et al v. White Lunch Limited*, [1966] S.C.R. 282, where Hall, J. held that labour relations legislation is remedial legislation and should be liberally construed.

6. The evidence before the Board established that by a majority vote the Council adopted the following motion that "The official strike date will be Thursday, May 22nd and all locals be notified to comply". At this meeting it was quite clear that the representations of two

affiliated bargaining agents would be unable to participate in a strike on May 22, 1980. There was also a recognition at the meeting of the Council where the motion was adopted that different strike dates ought to be avoided when the representative of one affiliated bargaining agent stated: "I would like to say that if we all have different strike dates and we mess around we will never get an agreement. Let's get together and work like a team!" It appeared to be within the general contemplation of the representatives of the Council that the strike ought to commence on May 22, 1980, and that it was desirable that the affiliated bargaining agents ought to act together or "work like a team".

7. The respondents argue that a strike authorized by the employee bargaining agency could consist of a wide range of conduct which could commence at any future time. Moreover, the respondents argue that the strike authorized by an employee bargaining agency might include a directive as to the activities of each affiliated bargaining agent each of which might be different both as to nature and time provided that each individual action to be taken by each affiliated bargaining agent constitutes in itself a strike. This argument ignores the creation of carefully structured province-wide bargaining in the industrial, commercial and institutional sector of the construction industry and sections 125 to 136 of the Act. These sections contemplate one set of negotiations leading to one provincial collective agreement between each employer bargaining agency and each employee bargaining agency. See sections 131 and 133. The interpretation urged by the respondents is not within the true intent, meaning and spirit of section 134a in the context of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. In the opinion of the Board the interpretation of section 134a urged by the respondents is a narrow interpretation which ignores the reality of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. In our view, section 134a is to be interpreted so as to bring about an effective result. The Board adopts the reasoning of Viscount Simon in *Nokes v. Doncaster Amalgamated Collieries Limited*, [1940] A.C. 1014, 1022, where he stated:

...if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

In the opinion of the Board, section 134a is to be interpreted in the manner set forth in its decision dated June 4, 1980, in order to give effect to the scheme of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry in sections 125 to 136 of the Act. The Board has not redefined "strike" in section 1(1)(m) of the Act. The decision of the Board dated June 4, 1980, has addressed itself to the circumstances where a strike which would otherwise be lawful under the Act becomes unlawful under certain circumstances.

8. The first and second reasons raised by the Council is, in the Board's view, a narrow interpretation of section 134a(1) and fails to achieve the purpose of that section in the context of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. As stated earlier, the Board does not agree with this interpretation.

9. The third reason raised by the Council is framed in terms of the language of judicial

review. In the Board's opinion, its interpretation of section 134a(1) is reasonable for the reasons set forth earlier. The remarks of the Board in paragraph 14 of its decision date June 4, 1980, do not support the Council's characterization as a "finding". Such remarks referred to various possible circumstances which might arise in a given situation. These various circumstances are matters which the Board would consider in the exercise of its discretion under section 123 of the Act.

10. The fourth reason raised by the Council poses the question of whether the Board has asked itself the right question. Once again this reason is framed in terms of the language of judicial review. In the Board's view, it has asked itself the right question. After considering the evidence and the provisions of section 134a(1), the Board asked itself the question whether the respondents, in light of the provisions of sections 134a(1) and 123, have called or authorized an unlawful strike in the industrial, commercial and institutional sector of the construction industry.

11. The final reason raised by the Council once again argues that the Board's decision is patently unreasonable. The Board does not agree with the Council's analysis of the Board's decision or that its decision is patently unreasonable. It is the Act which creates the designated bargaining agencies and assigns certain rights and duties with respect to such agencies. The affiliated bargaining agents are required to work within the framework of province-wide bargaining in all of its aspects. The Board's remarks in paragraph 13 of its decision dated June 4, 1980, reflect the circumstances under which strikes are lawful and unlawful within the context of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry.

12. The Board is not persuaded on the arguments before it that the decision of the Board dated June 4, 1980, should be reconsidered or revoked. Accordingly, the requests to reconsider and revoke the decision dated June 4, 1980, are denied.

0843-80-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Applicant, v. **Ontario Hydro**, Respondent

Arbitration – Discharge – Grievor assaulting general foreman – Whether mitigating factors – No grounds for modifying penalty

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and M. J. Fenwick.

APPEARANCES: *L. C. Arnold and W. Howard for the applicant; Ross Dunsmore, Allen Bell and R. A. McClellan for the respondent.*

DECISION OF THE BOARD; November 25, 1980

1. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*.

2. The grievance alleges that the respondent violated the Provincial Construction Agreement (the "Collective Agreement") which was in force between the parties at all material times, by unjustly suspending Robert Smith (the "grievor") on or about March 21, 1980 for a period of three days, and by unjustly and without cause discharging the grievor on or about March 24, 1980.

3. At the commencement of the hearing counsel for the respondent stated that there was no objection by his client with respect to the jurisdiction of the Board to hear this matter. He also acknowledged that the grievor was an employee covered by the Collective Agreement, that the grievor had been discharged and that the respondent had the onus of establishing in these proceedings that it had "just cause" to discharge the grievor.

4. The hearing of this matter commenced on September 4, 1980, and continued on November 4 and 5, 1980. During the course of the hearing, a total of eight witnesses gave evidence. There are substantial conflicts in the evidence adduced by the applicant and the respondent concerning a number of material factual issues.

5. The grievor is a forty-five year old welder who is five feet eleven inches tall and is quite robust. He is married and has one child. The grievor's foreman is Brian Bailey, who is one of the seven foremen who reports to piping general foreman Roger Dallaire. Mr. Dallaire is fifty-five years old and has thirty-two years of experience as a supervisor. He is five feet four inches in height and weighs one hundred and fifty-five pounds.

6. The grievor was employed by the respondent at its Pickering project from February to June of 1979, when his employment was terminated as a result of his failure to report for work due to a medical problem. The (internal) notice of termination, prepared by his foreman on June 11, 1979 for inclusion in his employment record, included the following notation: "WILL REHIRE IF TIME KEEPING IS IMPROVED". The grievor was subsequently referred by the applicant to the Pickering project on October 1, 1979, where he worked for the respondent until he was laid off on December 1, 1979 as a result of a shortage of work. He was recalled to work at the project on February 5, 1980, and continued in the employ of the respondent until his discharge which gave rise to the present case.

7. On March 7, 1980, the grievor was suspended for one day (March 12, 1980) without pay by Mr. Dallaire for violating safety rules by failing to wear safety glasses. Prior to the suspension, the grievor had received two verbal warnings for failing to wear safety glasses. Although the grievor filed a grievance with respect to the suspension and contended that Mr. Dallaire had not seen him without his safety glasses on, the grievor ultimately decided not to pursue his grievance.

8. Mr. Dallaire testified that on March 19, 1980, at approximately 11:00 a.m. he saw the grievor talking to another employee, Thomas Atherley, on level 274 of the project. This concerned Mr. Dallaire since the grievor was supposed to be working on level 254 (20 feet below). Mr. Dallaire told the Board that he turned around and thought about the situation for 30 or 40 seconds to determine what to do. It was his evidence that he would normally have gone directly to the grievor's foreman in such circumstances. His hesitation that morning resulted from the fact that when he had attempted to telephone Mr. Bailey on the site earlier that day, sub-foreman George Kemp had answered and had advised that Mr. Bailey had not yet arrived. After considering the matter for about half a minute, Mr. Dallaire decided to ask

the grievor what he was doing on that level. However, when Mr. Dallaire turned around again, the grievor "had disappeared and Mr. Atherley was back working where he was supposed to be". Mr. Dallaire returned to his office and telephoned Mr. Bailey who had arrived on the project by that time. Mr. Dallaire told him what he had seen and asked him to tell the grievor that he (Mr. Dallaire) had seen him on level 274 and to warn him that he was to stay at his place of work. According to the grievor, Mr. Bailey told him that Mr. Dallaire had said that he had seen him (the grievor) talking to Mr. Atherley on level 274 "for about an hour". Upon hearing this, the grievor said: "No, it wasn't me." After speaking with Mr. Dallaire again, Mr. Bailey returned and told the grievor that Mr. Dallaire maintained that it was him (the grievor) that Mr. Dallaire had seen. With respect to the disciplinary consequences of this incident, Mr. Dallaire testified: "As far as I was concerned, this was a verbal warning and it was over. I didn't make any formal record. I didn't think it was serious enough to make any record."

9. The grievor testified that he did not leave his work position on level 254 during the morning of March 19, 1980. He further testified that he did not go up to level 274 and did not have any conversation with Mr. Atherley that morning. In his testimony before the Board, Mr. Atherley confirmed that he did not see or talk to the grievor that morning. It was his evidence that on the morning in question, he and three other persons, including one Leroy Francis, were standing away from the scaffolding where they had been working because some boilermakers were cutting a hole in the grid overhead and they had to get out of the way. Mr. Atherley also testified that while they were standing there, Mr. Dallaire came upstairs, and that as soon as Mr. Francis saw Mr. Dallaire, he (Mr. Francis) ran behind a vessel out of Mr. Dallaire's range of vision. Mr. Atherley's explanation for Mr. Francis' conduct was: "A lot of people at Hydro are afraid of the supervisors; they keep running when they see one of them."

10. The Board is satisfied that Mr. Dallaire honestly believes that he saw the grievor with Mr. Atherley on level 274 on the morning of March 19, 1980. Although Mr. Francis did not testify before the Board, and although he was described as being somewhat smaller than the grievor, it is possible that Mr. Dallaire mistook Mr. Francis for the grievor since Mr. Dallaire was approximately forty feet away and only observed the person in question for a very short period of time. Accordingly, for the purposes of this case, we shall assume without deciding that the grievor was not on level 274 on the morning of March 19, 1980.

11. The grievor alleged that Mr. Dallaire had been "bird dogging" him by watching him very closely in an attempt to find reasons to discharge him. However, this allegation is not supported by the evidence. In fact, the evidence establishes that Mr. Dallaire arranged for the grievor to work with a different pipe fitter at the request of the grievor when the grievor expressed concern that he might be laid off (as apparently that happened once before) due to the ineptitude of the pipe fitter with whom he was originally assigned to work. If Mr. Dallaire had been eager to have the grievor removed from the site as alleged by the grievor, it is very unlikely that he would have exercised his managerial discretion in this manner so as to fulfill the grievor's request.

12. The grievor was very concerned about the allegation that he had been seen on level 274 as he was afraid that he might lose his job. Accordingly, before reporting for the next morning, he went to the personnel office and spoke with Bruce Barley, an assistant personnel officer. Mr. Barley advised him to see his steward about filing a grievance if he was unable to resolve the matter satisfactorily by speaking with Mr. Bailey and Mr. Dallaire. Later that morning, the grievor explained the situation to Ron Gard, the chief union steward on the

project, and asked him to speak with Mr. Dallaire about it. Mr. Gard agreed to do so; however, before he had an opportunity to speak with Mr. Dallaire, the events occurred which gave rise to the discharge of the grievor.

13. Mr. Dallaire testified that at approximately 11:00 a.m. on March 20, 1980 while he was in a corner on level 254 waiting for an elevator which would take him up to the level on which his office was situated, the grievor walked up to him and yelled several times in an angry voice: "You fuckin' liar. Get off my fuckin' back". As he spoke, the grievor moved closer to Mr. Dallaire and shook his pointing finger about one half inch from Mr. Dallaire's face. Mr. Dallaire's testimony concerning his reaction to this situation was:

"I said: 'If you want to talk go ahead but I'm not listening.' ... I was scared because I thought he would use physical force on me. I was scared that if I said anything, he'd think I was fighting back and would hit me. ... When the elevator came, I stepped in. I didn't look back to see what Mr. Smith did."

14. The grievor's evidence concerning that encounter differed markedly from that of Mr. Dallaire. His evidence was as follows:

"About two hours later at approximately 10:30 a.m. I saw Mr. Dallaire coming around. I said: 'Hello Roger. What's going on? You told Mr. Bailey that you saw me talking to Tom Atherley for about an hour.' I wasn't mad or anything at the time. Mr. Dallaire said: 'You called me a fucking liar before and you're not going to get away with it.' I said: 'Are you serious Roger?' He said: 'I don't want to hear anything from you.' He went towards the elevator. I told him I was going to get Atherley to tell him that I wasn't there."

The grievor also denied that he had shaken his finger at Mr. Dallaire.

15. Following this encounter with the grievor, Mr. Dallaire returned to his office with the intention of telephoning Joseph McCormick, assistant piping superintendent, to discuss the incident. However, when he reached his office, he found Mr. McCormick there talking to a third person. By the time Mr. McCormick concluded his conversation with that person, the grievor had arrived at the office with Mr. Atherley, whom he had approached at his work station with the request that he accompany him to Mr. Dallaire's office to assist him in attempting to prove that he had been falsely accused of being with Mr. Atherley on the previous morning as a result of "mistaken identity". Although the grievor had come to the office with the intention of speaking to Mr. Dallaire, when he found Mr. McCormick there, he told Mr. McCormick that he wanted to speak to him. However, Mr. McCormick, who testified that he observed that "they were quite excited about something" and "could see that it involved Mr. Dallaire", told them that he was going to talk to Mr. Dallaire first. Mr. Dallaire then asked them if they had a referral slip from their foreman (authorizing them to leave their work stations for the purpose of coming to his office). When they replied in the negative, he asked them to return to their foreman to obtain one, and told them that he would talk to them when they returned with the slip. Mr. Gard testified that an employee is required to obtain a referral slip before going to a general foreman's office, but that this requirement may not have been known by everyone on the site since "it does not happen very often".

16. Mr. McCormick and Mr. Dallaire then discussed what had occurred between the grievor and Mr. Dallaire at the elevator. As a result of that discussion, Mr. McCormick told Mr. Dallaire to discharge the grievor for insubordination. Mr. McCormick advised the Board that in his experience, the practice of the respondent is to immediately discharge any employee who is insubordinate to a supervisor. He also stated:

“We will not tolerate insubordination to any of our supervisors. A foreman has a crew of anywhere from ten to fifteen men. He has to get the work from them. If any of them is insubordinate and other men see this, we wouldn’t be in the construction business — we wouldn’t be productive.”

17. Meanwhile, the grievor had returned to work on the advice of his foreman who, when asked for a referral slip, told the grievor and Mr. Atherley that they should go back to work before they got themselves into any further trouble. Mr. Bailey also told the grievor that he “would handle it from there”. A few minutes later Mr. Bailey, acting on instructions from Mr. Dallaire, gave the grievor a separation slip which indicated that the grievor’s employment was being terminated for insubordination.

18. After eating lunch, the grievor began to gather up his tools. While the grievor was riding down on an elevator with a welding machine and some other tools, Mr. Dallaire entered the elevator along with foreman John Watson. Mr. Dallaire testified as follows concerning the events which occurred thereafter:

“We rode down to [level] 254. I got out of the elevator with my foreman [John Watson]. Mr. Smith had his welding machine with him (on one wheel). He wheeled it out of the elevator and dropped it on the floor in front of the elevator . . . I came out of the elevator and turned left to go to another elevator that goes to [level] 225 . . . I was about twenty feet from the elevator when I heard Mr. Smith say: ‘Hey, I want to talk to you.’ I stopped and Mr. Smith walked towards me and stopped about two feet from me. He asked me: ‘Why did I get fired?’ I said: ‘Well, you called me a fuckin’ liar.’ At that point, he closed both fists and he hit me on both shoulders with both fists and said: ‘You’re a fuckin’ liar.’ I fell on my back on the concrete floor. My hard hat fell away about fifteen feet from me. I was lying on my back on the concrete. As I was getting up, he picked up my hard hat and threw it at me and hit me on the head . . . Mr. Smith then started to come my way again. Mr. Watson kind of restrained him. I picked up my hat and walked away. I didn’t turn around. I was just getting out of there. I felt very scared while I was on the floor. I didn’t know if he was going to come at me with his fists or his feet.”

After calling security to report the incident, Mr. Dallaire went to first aid for examination by a physician. Although Mr. Dallaire was not absent from work as a result of the incident, he had a lump on his head for about a week and also experienced headaches and a sore back for three or four days. He further testified that the events adversely affected his efficiency for several weeks.

19. Mr. Watson also testified before the Board. It was his evidence that after he left the

elevator with Mr. Dallaire, he heard the grievor say to Mr. Dallaire in an authoritative voice: "I want to talk to you." Mr. Dallaire then turned and walked back toward the grievor while Mr. Watson continued to walk away from the elevator. Mr. Watson heard a commotion and heard the grievor calling Mr. Dallaire a "liar" in a very strong tone. When Mr. Watson turned around, he saw Mr. Dallaire lying on the floor. Mr. Watson further testified that the grievor grabbed Mr. Dallaire's hat from the floor and threw it "hard", striking Mr. Dallaire on the forehead. It was also Mr. Watson's evidence that he went over to the grievor, grabbed him by the arm and told him to "take it easy".

20. The grievor's testimony concerning this encounter was as follows:

"I went to pick up my tools. I went to the fourth floor. I was coming down to the first floor. Me, Mr. Dallaire and the operator were on the elevator. I didn't see anyone else . . . I went down to the first floor. We got off the elevator. I said 'Roger I'd like to speak to you.' He came over to me. I said: 'Why did you fire me Roger?' He said: 'Because you called me a fuckin' liar. If I had my way I'd get rid of all of you niggers anyway.' . . . At this point he was close to me. I put both my hands on his shoulders and pushed him away. He fell to the floor and his hard hat fell. I picked it up and threw it - not at him. It bounced off the washroom wall. It didn't hit him."

When asked in cross-examination why he did not speak with Mr. Dallaire on the elevator rather than waiting until they had left the elevator, the grievor stated:

"I have my own way of doing things. I didn't want nobody to hear what I was saying to him. I didn't want to say it in front of the operator."

The grievor also stated that he did not think it was wrong to have pushed Mr. Dallaire.

21. It was the grievor's evidence that he did not see Mr. Watson but that there were "a lot of people around" on level 254 outside the elevator. He further testified that he did not recall anyone trying to calm him down and that no one touched him. The grievor described his emotional state at the time of the incident as being "in a rage", "crying", "furious" and "very angry". Nevertheless, he maintained that he merely pushed him away "not hard" and that Mr. Dallaire must have "slipped" or "tripped" as he did not push him hard enough that he would have fallen. He also stated: "I felt like I could have whipped his ass, I'll tell you the truth. But I just left it and walked away."

22. Later that day at a meeting between the applicant and the respondent, Mr. McCormick was persuaded by the applicant to substitute for the discharge a "three day suspension without pay pending further investigation." At that meeting the grievor indicated that he had lightly tossed the hard hat and denied that he had thrown it with a great deal of strength. However, at the hearing he testified that the hard hat struck the washroom wall after he threw it. Since the washroom wall was approximately fifty feet from where the grievor was standing when he threw the hard hat, it is apparent the the grievor's testimony at the hearing concerning the force with which he threw it is inconsistent with his statement on the day in question. The grievor's testimony concerning the throwing of the hard hat against the washroom wall is also inconsistent with Mr. Watson's testimony concerning the matter.

23. During the following three days, Mr. McCormick interviewed “everybody that [he] could determine was involved in the incident”. After speaking with a total of nine persons and reviewing the grievor’s personnel file, he concluded that the grievor should be terminated for cause. Mr. McCormick subsequently notified the grievor of this decision by registered letter dated March 24, 1980. The respondent’s (internal) “employee data change” form which was placed in the grievor’s personnel file in respect of his initial termination on March 20, 1980 (following the first elevator incident) indicates that the respondent would rehire the grievor, and contains the following “remarks”:

“This man could improve his time keeping. He could also control his temper and not make abusive remarks about his supervision. Must be interviewed by superintendent before rehire.”

At the hearing, Mr. McCormick confirmed that the grievor would be rehired if he fulfilled those conditions.

24. As is apparent from the evidence summarized above, credibility is one of the crucial issues in this case. In assessing the credibility of the various witnesses, the Board has considered such factors as the consistency of the evidence of each of the witnesses, their firmness of memory, their ability to resist the influence of interest to modify their recollections clearly and their demeanour.

25. There were a number of inconsistencies in the grievor’s testimony. For example, he stated during examination in chief that he was angry when he told Mr. Dallaire that he would like to speak to him and asked him the reason for his discharge. However, in cross-examination he indicated that he was not angry when he got off the elevator and that he spoke quietly to Mr. Dallaire. When asked during cross-examination why he did not tell Mr. McCormick, at the meeting between the applicant and the respondent held later that day, that he did not hit Mr. Dallaire with the hard hat, the grievor at first stated: “I did say that.” However, he subsequently said: “No one mentioned anything to me about a hard hat at that meeting.” In his initial testimony as set forth above concerning the racial slur allegedly made by Mr. Dallaire, the grievor testified that Mr. Dallaire used the term “nigger”. However, in his subsequent testimony, the grievor indicated that the term allegedly used by Mr. Dallaire was “fuckin’ nigger”. Although the use of either expression would be utterly reprehensible and inexcusable, the grievor’s subsequent embellishment of his initial testimony concerning this very significant aspect of the case casts further doubt upon the credibility of his testimony. Moreover, several material aspects of the testimony of Mr. Dallaire are corroborated by the testimony of Mr. Watson whom the Board found to be a very candid and credible witness. In particular, Mr. Watson confirmed that the grievor threw the hard hat at Mr. Dallaire and struck him on the head with it. Although Mr. Watson’s recollection of the precise words used differs somewhat from that of Mr. Dallaire, the evidence of Mr. Watson confirms that the grievor called Mr. Dallaire a “liar” during the course of “the commotion” in the second elevator incident. This is quite significant since it is most unlikely that a person would respond in such a manner to the racial slur which Mr. Dallaire is alleged to have uttered. Mr. Watson also confirmed that he attempted to physically restrain the grievor during the second elevator incident. It is also of some significance that Mr. Watson’s description of the attitude of the grievor toward Mr. Dallaire during that second incident is similar to Mr. Dallaire’s evidence concerning the grievor’s attitude toward him during the prior incident. Thus, Mr. Watson’s evidence also supports the credibility of Mr. Dallaire’s version of the first elevator incident.

26. Accordingly, having regard to all of the evidence before it and to the foregoing considerations concerning credibility, the Board accepts the evidence of Mr. Dallaire and rejects the evidence of the grievor insofar as his evidence conflicts with that of Mr. Dallaire with respect to the incidents which occurred on March 20, 1980. In particular, the Board finds that the grievor called Mr. Dallaire a "fuckin' liar" and shook his finger in Mr. Dallaire's face in a menacing manner during the first "elevator incident". The Board also finds that Mr. Dallaire did not utter a racial slur as alleged by the grievor, but that the latter did forcefully strike or push Mr. Dallaire to the floor and strike Mr. Dallaire on the head by throwing his hard hat at him while he was on the floor. At no time did the grievor offer any apology to Mr. Dallaire for his actions.

27. The appropriate disciplinary response by an employer to an assault on a foreman or other member of management has been the subject of a great number of arbitral decisions. Although all of the cases obviously turn upon their own peculiar facts, the jurisprudence clearly indicates that such assaults are very serious matters which warrant severe discipline. See, for example, *Re Spruce Falls Power and Paper Co. Ltd.* (1978), 22 L.A.C. (2d) 343 (Brunner) and *Consumers Gas Co. Ltd.* (1970), 20 L.A.C. 78 (H.D. Brown). See also *Re Canadian Carborundum* (1973), 5 L.A.C. (2d) 29 (Arthurs), which contains the following passage:

"At the outset, it must be said that under no circumstances is an employee justified in verbally or physically abusing his foreman. In the interests of orderly relations within the plant, and the maintenance of morale and discipline, such conduct in principle cannot be condoned. However, the circumstances giving rise to employee conduct in this case, as in every case, must be examined in order to determine whether the penalty imposed is (in the language of art. 12.02 of the agreement) 'too severe', and whether a more 'just and equitable' penalty should be substituted therefor."

Thus, assaults upon managerial persons have in the majority of cases resulted in discharges being sustained (see Brown and Beatty, *Canadian Labour Arbitration*, (Agincourt: Canada Law Book Limited, 1977) at 325, footnote 269 and accompanying text, and Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworths, 1978) at 256, note 68 and accompanying text). However, a number of recent awards have held that assaults upon supervisors do not necessarily justify discharge if mitigating circumstances are present. For example, in *Re Canron Ltd.* (1975), 9 L.A.C. (2d) 391 (Shime), a one year suspension was substituted for discharge where the foreman, who was partially responsible for escalation of events which culminated in mutual assaults, was not completely candid in his testimony before the arbitrator; in *Re Davis Lumber Co. Ltd.* (1975), 9 L.A.C. (2d) 126 (Curtis), a six month suspension was substituted for discharge where the grievor had progressed during his four years of employment with the company from a labourer to a shipper and then to a tow motor operator, had no prior disciplinary record and assaulted his supervisor during a momentary flare-up that caused his supervisor no significant physical harm; in *Re Ford Motor Co. of Canada Ltd.* (1974), 7 L.A.C. (2d) 199 (Palmer), the arbitrator found that the grievor's assault upon the head general foreman did not constitute a culminating incident due to harrassment of the grievor by his immediate foreman, belligerent actions of the head general foreman and personal factors including bereavement, family problems and lack of sleep; and in *Re Canadian Carborundum*, *supra*, a one year suspension was substituted for the

discharge of the grievor because (1) the employee had an unblemished work record of three years, (2) the foreman himself engaged in verbal abuse which provoked the grievor to offer verbal abuse in return, (3) the grievor's physical violence was momentary, unpremeditated and of a minor nature (he merely "shoved the foreman, telling him to 'get out of [his] way.'"), and (4) the grievor immediately and spontaneously realized that he had been guilty of misconduct and tendered his apologies to his foreman. (See also *Re Galco Food Products Ltd.*, (1974), 7 L.A.C. (2d) 250 (Beatty) and *Re Firestone Tire and Rubber Co. of Canada Ltd.* (1975), 9 L.A.C. (2d) 345 (Mason).)

28. In *Re Dominion Glass Co.* (1975), 11 L.A.C. (2d) 84, the chairman (now Mr. Justice Linden) considered the following factors to be relevant in determining whether discharge is justified on the facts of a particular case involving an assault upon a member of management: (1) the identity of the person attacked; (2) whether the assault was a momentary flare-up or a premeditated attack; (3) the seriousness of the attack; (4) the presence or absence of provocation; (5) the disciplinary record of the employee; (6) the length of service of the employee; (7) the economic effects of the discharge; and (8) the presence or absence of an apology. Those eight factors were also adopted and applied in *Re Spruce Falls Power and Paper Co. Ltd.*, *supra*.

29. In the present case the assault was upon the general foreman to whom the grievor's foreman was directly responsible. Although the evidence indicates that the general foreman generally deals with employees through their respective foremen, there are occasions when individual employees have direct contact with their general foreman. For example, the evidence indicates that as a result of an absence during his first week of work following his recall from lay-off in early February of 1980, the grievor was advised by Mr. Dallaire that he was "expected to work five days a week". Moreover, as previously mentioned, the grievor approached Mr. Dallaire directly to request that a different pipe fitter be assigned to work with him. The evidence also establishes that if an employee is unable to resolve a complaint or other concern satisfactorily by speaking with his foreman, he then approaches his general foreman concerning the matter. The general foreman circulates throughout the area for which he is responsible to exercise general supervision and control over the work being performed. To perform his functions effectively, he must be able to move about the project without fear of personal attack or abuse. In view of the circumstances, it is apparent that disciplinary or control problems could result if the grievor was reinstated in his former position.

30. Counsel for the applicant contended that each of the two "elevator incidents" constituted a momentary flare-up. Although we are not prepared to find that either of those incidents was premeditated in the sense that the grievor sought out Mr. Dallaire with a view to assaulting or abusing him, we are satisfied that in the first incident, the grievor, upon encountering Mr. Dallaire, consciously elected to conduct himself in such manner as to cause Mr. Dallaire to fear for his personal safety. With respect to the second incident, it is not without significance that the grievor chose not to confront Mr. Dallaire in the elevator but rather decided to wait until after he had left the elevator. Thereafter, he summoned Mr. Dallaire, deliberately pushed or struck him with considerable force and, while Mr. Dallaire was lying on the floor, the grievor committed a further act of wilful violence by picking up the hard hat and throwing it forcefully at Mr. Dallaire. Viewed in totality, those incidents demonstrate that the grievor was a worker of violent and potentially dangerous temperament.

31. Although the grievor may have had a legitimate grievance with respect to the verbal

warning given to him by Mr. Bailey at the direction of Mr. Dallaire for allegedly being on the wrong level on March 19, 1980, the proper procedure for dealing with that grievance, as recognized by the grievor, was to approach his steward if he was unable to satisfactorily resolve the matter by speaking with Mr. Bailey and Mr. Dallaire. Even if (as we have assumed for the purposes of this case) the grievor was wrongly accused of being on that level as a result of mistaken identity, this does not provide any justification whatsoever for abusing a general foreman in the manner in which the grievor did in the first "elevator incident" described above. Nor was there any provocation for the second incident. If the grievor was of the view that discharge was an excessive disciplinary response to the first incident, it was open to him to follow the normal civilized procedure of filing a grievance. As stated in *Re Dominion Glass, supra*, at 85, [e]mployees must not think that every time they feel they are aggrieved by a foreman (or a fellow worker for that matter) they may resort to violence with impunity. Violence is as wrong in an industrial plant as it is in society generally, and it must be deterred if at all possible." This statement is, of course, equally applicable to a construction site where factors such as height above the ground, openness of unfinished premises, presence of rough surfaces and proximity to potentially dangerous equipment, combine to create an environment in which violence has an even greater potential for injurious or fatal consequences. If Mr. Dallaire had uttered a racial slur as alleged by the grievor, the existence of such provocation would undoubtedly have been a mitigating circumstance. However, as indicated above, we are satisfied that Mr. Dallaire did not do so.

32. Although the first "elevator incident" merely caused Mr. Dallaire to experience a transitory apprehension of harm, that incident would nevertheless have justified disciplinary action of at least a substantial suspension from work without pay in view of the insubordinate nature of the grievor's words and actions, and in view of his employment record. However, that incident cannot be viewed in isolation in the present case as it is clear that Mr. McCormick's ultimate decision to discharge the grievor was based not only on that incident but also on the even more serious incident which followed it and on the grievor's employment record. The second "elevator incident" involved a violent attack by the grievor upon his general foreman in the presence of a number of other persons including other workers and foremen. Although the grievor's act of striking or pushing Mr. Dallaire to the floor caused only temporary pain and discomfort, it could have resulted in very serious bodily harm. Moreover, the subsequent throwing of the hard hat by a person of the grievor's relatively large size and strength could well have caused grievous bodily harm in view of the weight and shape of the hard hat (which was introduced as an exhibit at the hearing).

33. As indicated above, the grievor's total length of service with the respondent was less than nine months. During his final month of service, he received a one day suspension for violation of safety rules following two verbal warnings for similar misconduct. Thus, the grievor does not have a long, unblemished employment record of productive service in the context of which incidents in question may be viewed as isolated aberrations.

34. The grievor testified that he has experienced some domestic and financial problems which "could have something to do with not having a job". However, there is no evidence which indicates that the economic consequences of his discharge have been more severe than those which are generally experienced by a discharged worker. Moreover, it is also significant to note that the respondent has indicated that it would rehire the grievor in the future if it was satisfied through an interview by a superintendent that he had improved his timekeeping and had developed an ability to control his temper and to refrain from making abusive remarks.

Accordingly, this is not a case of a middle-aged long term employee who, as a result of his discharge from employment, will inevitably face bleak employment prospects.

35. As indicated above, the grievor did not at any time apologize to Mr. Dallaire for his misconduct. The grievor had ample opportunity to offer such apology at the meeting between the applicant and the respondent during the afternoon of March 20, 1980 at which a three day suspension pending further investigation was substituted for his discharge. Far from apologizing, the grievor, as he was leaving that meeting, stated that if he had had a gun, he would have shot Mr. Dallaire. As previously indicated, even at the continuation of the hearing of this matter on November 4, 1980, more than seven months after his discharge, the grievor was not at all remorseful concerning his misconduct. In cross-examination, he stated: "I don't think it was wrong of me to push Mr. Dallaire. He was in my face, I had no choice." Moreover, the grievor further demonstrated his lack of remorse by denying that he had struck Mr. Dallaire with the hard hat and by continuing to falsely accuse Mr. Dallaire of having made an utterly reprehensible racial slur. This lack of candour before the Board is a further factor which militates against the substitution of a lesser penalty for the discharge of the grievor (see *Foster Wheeler Limited*, [1979] OLRB Rep. Dec. 1160, at paragraph 22).

36. In his evidence in chief, the grievor expressed the view that he could return to work for the respondent under Mr. Dallaire. However, under cross-examination he stated: "I know that Mr. Dallaire doesn't tell the truth. I could work with somebody else. I don't know if I'd find it difficult following Mr. Dallaire's orders. I would rather work for somebody else than Mr. Dallaire." In his evidence Mr. Dallaire, after indicating that he was never in his thirty-two years of supervision been involved in incidents similar to those in the present case, stated: "I'd be scared to have Mr. Smith working with me again." Accordingly, reinstatement by this Board of the grievor into his former position might well result in continuing tension and conflict between the grievor and Mr. Dallaire to the detriment of the respondent.

37. Having regard to all the evidence and the submissions of the parties, the Board finds that the respondent had just cause to discharge the grievor. The Board further finds that this is not an appropriate case in which to substitute a lesser penalty for discharge pursuant to section 37(8) of *The Labour Relations Act*. Accordingly, the grievance is hereby dismissed.

0701-80-R Rene Herweyer, Applicant, v. Retail Clerks Union Local 486, Respondent, v. Steve Duga, carrying on business as **Otto's Deli**, Intervener.

Collective Agreement – Termination – Timeliness – Whether notices given prior to notice period in agreement effective – Board not following *Hield Bros.* – Notices given within period under section 45 sufficient – Employer bound to agreement under section 55 – No previous allegiance to union – Whether employer's conduct affecting voluntariness of termination petition

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members F.W. Murray and H. Simon.

APPEARANCES: *F.J. Mathews for the applicant; Alick Ryder, Q.C. for the respondent; and R.J. McComb for the intervener.*

DECISION OF R.O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER H. SIMON; November 20, 1980

1. This is an application for termination of the respondent union's bargaining rights. The application raises two issues: whether, having regard to the scheme of *The Labour Relations Act*, the application is timely; and, whether in the rather unique circumstances of this case, the Board can be satisfied that the employees have voluntarily signified their opposition to union representation. It will be convenient to deal with each of these matters in turn.

I

2. The union is a party to a collective agreement with Loblaw's Limited covering the Ottawa area, and running from January 1978 to May 31, 1980. In or about October 1979, Loblaw's sold one of its delicatessen outlets to the intervener. On May 7, 1980, the Board declared that the intervener was "a successor employer" within the meaning of section 55 of *The Labour Relations Act*; and that accordingly, it remained bound by the predecessor's (Loblaw's) agreement. The provisions for termination and renewal of that collective agreement read as follows:

"27.01 This Agreement shall become effective as of June 1st, 1978 and shall continue until May 31st, 1980. It shall continue automatically from year to year thereafter until either party serves written notice on the other party by registered mail within sixty (60) days and not less than thirty (30) days prior to the expiry date. Such notice shall indicate any changes to be negotiated. When such notice has been served by either party bound by this Agreement, the other party shall attempt to commence negotiations within a period of two (2) weeks from receipt of the notification. All conditions of this Agreement are to remain in force and effect until negotiations are completed and/or conciliation proceedings exhausted."

3. On March 11, 1980 (i.e. before both the section 55 application and the Board's section 55 declaration) the union sent a notice to the intervener indicating its desire to bargain for a new collective agreement. This notice, it will be observed, does not comply with the time

limits prescribed in the collective agreement; although it does comply with the broader time limit prescribed by section 45 of *The Labour Relations Act*. The relevant portions of that section read as follows:

“(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 1.”

There is no evidence that the intervener rejected the notice to bargain or raised any complaint concerning its timeliness. There is also no evidence of any meeting between the parties, bargaining, or communications with respect thereto. On June 27, 1980, the present termination application was filed (i.e. after May 31st, the nominal expiry date of the collective agreement). The union contends that the application is untimely.

4. The union argues that its notice to bargain did not comply with the time limits set out in the collective agreement, and that for this reason, the agreement continues in force for another year. The union contends that the situation is governed by section 49(2)(c) of the Act, which provides that a termination application can only be made during the last two months of the agreement's extended term of operation (i.e. April, and May 1981). Section 49(2)(c) provides:

“49(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit, ...

(c) in the case of a collective agreement referred to in clause a or b that provides that it will continue to operate for any further term or successive terms *if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal*, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.”

The union argues that the notice to bargain referred to in 49(2)(c) refers only to a notice properly given under the collective agreement, and relies on the decision of this Board in *Hield Brothers Limited* 57 CLLC ¶18,072 for the proposition that the right to give notice under section 45 of the Act is not available in the case of a collective agreement framed in the language of the present one. Since section 45 cannot apply, it is irrelevant that the notice to bargain comes within the time limits prescribed by section 45. The terms of the agreement prevail, and the failure to comply with those terms results in both a continuation of the old agreement, and a bar to the present application. In the union's submission, there was a failure

to give notice in accordance with the agreement, a section 45 notice is unavailable, the agreement continues in effect and no termination application can be made.

5. As a matter of interpretation we find it difficult to accept that an *early* notice to bargain is insufficient to terminate the agreement on its nominal expiry date. The purpose of notice provisions is to ensure that both parties have an adequate opportunity to prepare their bargaining positions prior to the expiry of the agreement, and surely the parties could not have intended that an early notice would be ineffective, and that the agreement would therefore continue for a further year. We do not propose to review the numerous cases which distinguish between "mandatory" and "directory" provisions of a collective agreement, (but see generally: Brown and Beatty, *Canadian Labour Arbitration*, Canada Law Book, 1977 pp. 78-84); it suffices to say that we do not think that the parties intended the continuation provisions to operate despite a notice which was not only adequate but, in fact, more generous than that required by the agreement. Moreover, we see no reason for concluding that this early notice was a nullity, and could not be cured by the simple passage of time. There is no evidence that it was rejected or withdrawn, and we do not see why it cannot take effect on March 31, 1980 - the first day for giving notice prescribed by the collective agreement. There is, however, an alternative reason for rejecting the union's claim that the present application is untimely; but, in order to appreciate the view which we take of this matter, it is necessary to specifically address both the *Hield Brothers'* case upon which the union relies, and what we conceive to be the scheme of *The Labour Relations Act*. As will become apparent, the term of the agreement, the right to give notice to bargain, the right to apply for conciliation, and the right to challenge the union's status as bargaining agent, are all interrelated.

6. A union acquires bargaining rights by demonstrating that the majority of the employees in a bargaining unit have become members, and a union can lose its bargaining rights when it no longer enjoys majority support. However, employees are not entirely free to select or reject a bargaining agent any time they wish. If such were the case, the stability of an established collective bargaining relationship would be jeopardized, and the certainty provided by a written collective agreement would be entirely illusory. The legislature has sought to balance the right of the employees to be represented by a bargaining agent of their own choosing, and the right of both the employer and an incumbent union to a reasonable degree of stability, by enacting statutory provisions which link the timeliness of representation applications to the term of the collective agreement. Basically, such applications can only be made during the last two months of the agreement's operation - that is, during the so called "open period".

7. Because the right to oust an existing bargaining agent is linked to the term of the collective agreement, it becomes imperative that the agreement's term be clear and easily ascertainable from the face of the document. There must be a fixed termination date from which the "open period" can be calculated. This object is accomplished by section 44 of the Act which provides, in part, as follows:

"(1) If a collective agreement does not provide for its term of operation or provides for its operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

(3) A collective agreement shall not be terminated by the parties

before it ceases to operate in accordance with its provisions for this Act without the consent of the Board on the joint application of the parties.

(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation."

8. Section 44 requires that a collective agreement must have a *specific* term of at least one year, and that this term cannot be altered without the consent of the Labour Relations Board. To an outside observer, it might seem odd that the parties to an agreement cannot effect a "novation", or by mutual consent alter the contract's term of operation; however, the reason for this restriction becomes apparent when one remembers that the agreement prescribes not just the terms and conditions of employment, but also the time when employees are permitted to challenge their union's bargaining rights and other unions can try to displace the incumbent. An alteration of the term affects the rights of third parties. If the parties to the agreement could alter its term of operation the "open period" could be eliminated or postponed. Similarly, if the termination date were uncertain, or depended upon the happening of an event extrinsic to the agreement and beyond the knowledge of the employees or a rival union, the timing of the open period would be uncertain, and neither the employees, nor other unions seeking to represent them would know precisely when their rights would arise. If the statutory scheme is to be effective therefore, the term of the collective agreement must be fixed, specific and easily ascertainable from the face of the agreement itself.

9. The expiry date of the collective agreement does more than delimit the open period during which an incumbent union's status can be challenged; it also governs the time during which either party may seek to renegotiate the collective agreement, and if necessary, resort to conciliation. Before a party may strike or lockout, there must be at least one stage of compulsory conciliation, and the right to resort to conciliation is contingent upon a party giving a "notice to bargain" within the 90 days preceding the expiry of the agreement (see section 45). A "section 45 notice" triggers the right to conciliation under section 15, and ultimately sets in motion the steps upon which the right to strike depends. As in the case of the "open period", the section 45 notice period is calculated with reference to the expiry date of the agreement.

10. The scheme of the Act envisages the periodic renegotiation of collective agreements and a right to resort to conciliation which is triggered by a notice within the period prescribed by section 45. In view of the simple language and purpose of section 45, it would be surprising in our view if a notice properly given within the prescribed time limit did not bring the subsisting agreement to an end and crystallize the right to resort to conciliation. Where the Legislature has envisaged that parties could "contract out" of a statutory provision, it has used very clear and specific language (see for example, section 37(5a)). No such language appears in section 45, and we do not think the Board should readily conclude that its provisions can be bypassed. Nevertheless, this is the effect of the *Hield* case to which we now turn.

11. The *Hield* case involved an interpretation of section 45 of the Act which, as we have already noted, provides that either party to a collective agreement may, within 90 days before the agreement "*ceases to operate*" give notice of a desire to renegotiate the agreement. The case dealt with a collective agreement which, like the present one, provides that it will continue in effect if notice to bargain is not given in accordance with a prescribed form. In *Hield*, the

Board held that a failure to give the prescribed notice means that the agreement never “ceases to operate” on its nominal expiry date, but rather continues *as if the term of operation had been longer ab initio*. For example, a one year agreement would not cease at the end of its nominal one year term of operation but would become, in effect, a two year agreement. The Board then reasoned that, there being no termination on the nominal expiry date, there was no end point from which to calculate the 90 day period contemplated by section 45. Because the agreement did not cease to operate on its nominal expiry date, section 45 had no application. In the result, the Board determined that by appropriate language in the collective agreement, the parties could modify or eliminate the right to give notice under section 45. A contractual notice period and a “continuation” clause could foreclose access to that section.

12. The Board in *Hield* did not enunciate any labour relations rationale for the interpretation it adopted (other than a general observation that a party which had negligently failed to give notice under its agreement should not be allowed to fall back on the Act); nor is it evident that this interpretation is the only or most reasonable one, having regard to the scheme of the Act. Indeed, it is difficult to discern what industrial relations policy is promoted by permitting parties to “contract out” of what appears to be a clear statutory right. This was the view expressed by the minority in *Hield*. The majority approach would also seem to result in a series of anomalies - bearing in mind that the *Hield* view turns on the proposition that the collective agreement does not expire on its nominal expiry date but continues in force as if it had a longer term *ab initio*.

13. Can the agreement be said to have a “specific term” within the meaning of section 44 of the Act, if its term of operation is *either* its nominal term of operation, *or* some longer period depending upon the giving of notice? When is the “open period”, which, as should be recalled, is also calculated with reference to the term of operation of the agreement? Is the open period postponed? Alternatively, does it make sense to say that the agreement terminates for the purposes of section 5 and 49, (so that a certification or termination application made “after the commencement of the last two months of its operation” is timely); yet does not terminate for section 45 purposes, (so that no notice can be given “within the period of 90 days before the agreement ceases to operate”)? If failure to give notice can alter the expiry date of the agreement, how can the employees or a third party determine when “the last two months of the agreement’s operation” will be? It cannot be assumed that such information will be provided by parties to the agreement who might well oppose alteration of the status quo. Do the rights which would arise during the open period disappear; and if this is the result, is it a tenable view of the Legislature’s intention? The *Hield* view appears to contemplate a notional revision of the agreement’s term of operation on the failure to give a timely notice, but this kind of revision with its associated impact on third party rights is precisely what sections 44(3) and (5) are designed to prevent.

14. None of these possibilities were considered by the Board yet they would seem to follow from its analysis. On the other hand, what mischief would arise or prejudice ensue if, despite the terms of any agreement, a party were entitled to give a notice to bargain within the time prescribed by section 45 which will eventually terminate the agreement and trigger the right to resort to conciliation and the other dispute settlement mechanisms prescribed by the Act? A termination of the agreement does not plunge the parties into a legal limbo, expose them to immediate economic conflict or prevent collective bargaining. On the expiry of the agreement section 70 of the Act maintains the collective bargaining status quo and no strike or lockout can occur until conciliation has been exhausted and the time periods prescribed in

section 63 have elapsed. In the absence of clear statutory language, or compelling policy considerations we do not think the Board should adopt an interpretation which limits the right to give notice and engage in the process of renegotiation contemplated by the statute - especially, where, as here, the reasoning supporting that interpretation raises analytical difficulties when applied to other related parts of the Act. As the Supreme Court of Canada observed in *William Bradburn v. Wentworth Arms Hotel Ltd. et al*, [1979] 1 S.C.R. 846 (per Estey J.), a tribunal should not readily embrace an interpretation which seems inconsistent with an established statutory scheme. Of course, nothing would prevent an automatic renewal of the agreement if neither party gave notice under section 45, but in our view it is more consistent with the scheme of the Act, to treat such continued operation as the automatic renewal for a further term, *after* expiry of the agreement on its nominal expiry date.

15. We have carefully considered the *Hield* case, as well as those cases which have followed it; and we might note that in all of the recent cases which have followed the *Hield* decision, the Board has expressly refrained from asserting its correctness. The Board has emphasized the reliance interests of the parties rather than the inherent logic of the decision or its industrial relations efficacy. In *Nortex Products* [1978] OLRB Rep. Nov. 1036 *Hield* was followed "with a considerable feeling of regret" and in *Canadian Chemical Workers Union*, [1980] OLRB Rep. July 952 the Board remarked that the *Hield* decision "may well be ripe for a reconsideration". We are also aware of the importance of consistency in the Board's approach to statutory interpretation. The Board's decisions create a background against which parties negotiate collective agreements, as well as reliance interests which cannot be ignored (although it might be noted that here it is the party which gave the notice which is now seeking to rely on its deficiency) Nevertheless, we do not think the *Hield* reasoning is either correct or consistent with the scheme of the Act, and we do not think that it should be followed. In our view, section 45 creates a substantive right, which cannot be avoided or abridged in the manner suggested by the Board in *Hield*. If proper notice is given within the 90 day time period prescribed by section 45, the agreement will terminate on its nominal expiry date, and the parties will be entitled to resort to conciliation - regardless of the notice provisions in the agreement. The parties may provide for notice periods different from those set out in section 45, and compliance with those provisions will satisfy the requirements of section 45(1) [see section 45(2)]. However, the basic rights to give a "section 45" notice cannot be removed by judicious drafting.

16. In the present case, a notice to bargain was given on March 11, 1980 - well within the 90 day period prescribed by section 45. In our view this notice was effective to terminate the collective agreement and entitled the union to engage in collective bargaining and apply for conciliation, even if it did not comply strictly with the notice procedure in the collective agreement. Since there was no collective agreement in operation at the time the application for termination was made, and since there was no application for, or appointment of, a conciliation officer such as to bring into operation the bar prescribed in section 53 of the Act, we are satisfied that the present termination application is timely.

II

17. The remaining issue before the Board is whether the petition filed in support of this application reflects the voluntary wishes of those who signed it. The onus is upon those seeking to rely on this statement to satisfy the Board in this regard. The approach which the Board takes in these matters has recently been reviewed in *Grove Park Lodge* [1980] OLRB

Rep. Feb. 235, in a long passage to which we might usefully refer. At page 240, the Board commented:

“The Board has always been sensitive to the particular vulnerability of employees arising out of the employer-employee relationship. As stated in the *Pigott Motors (1961) Ltd.* case, 62 CLLC ¶16,264:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories.

and in the *Peel Block Co. Ltd.* case, 63 CLLC ¶16,227:

It is a function and duty of this Board to be vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent.

See also *CCH Canadian Limited* [1975] OLRB Rep. Jan. 19, which involved an application for termination of bargaining rights.

17. The Board has before it, in the present case, a cogently-worded statement of desire signed by almost the full complement of the bargaining unit. The Board must still be satisfied, however, that the motivation behind such a statement was of a truly voluntary nature; that is, as the above cases indicate, that the employees are not simply identifying themselves with the choice of their employer, out of fear of antagonizing their employer, or fear of reprisal, or for whatever reason. This is a fundamental duty which the Board owes to the employees themselves, and is made a pre-condition under section 49(3) of *The Labour Relations Act* to its power to direct the holding of a representation vote.

18. As the *Pigott Motors* case, *supra*, makes clear, so vulnerable are employees to employer influence that the influence need not even be created by employer design. The Board in a long line of cases has refused to accept as voluntary a statement of opposition to a trade union signed in circumstances where the employees could reasonably believe that their failure to sign would come to the attention of management. In the *Morgan Adhesives of Canada Limited* case, [1975] OLRB Rep. Nov. 813, for example, the Board stated at paragraphs 30 and 31:

30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board which would support such a finding.

31. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management.

19. In carrying out its statutory duty, the Board is at the same time conscious that it must not be overprotective of employees' interests to the point where its evidentiary requirements become an unwitting-trap for those very employees trying to express themselves. At all times a balance must be struck."

18. What makes this case somewhat unusual is that the bargaining rights which the applicant seeks to displace are not founded on either a certification or an established collective bargaining relationship with the intervener. The union acquired the right to represent the intervener's employees as a result of a section 55 declaration which bound the intervener and his employees to the terms of a bargaining relationship between the union and Loblaw's. There is no evidence that any of the employees had any pre-existing allegiance to the union or that, following the section 55 declaration, the union made any effort to solicit their support or forge such relationship. It may be that in the face of employer opposition, the union might have faced some difficulties; however, there is no evidence that any attempts were made to contact the employees or communicate the relative advantages of trade union representation. In the circumstances, some dissatisfaction or confusion about the value of such representation would not be surprising. This is not a situation in which employees have had a sudden and inexplicable change of heart concerning union membership which they had affirmed a short time before, nor is this a case in which employees are seeking, without apparent reason, to displace a long established bargaining agent. In the absence of factors such as these, it is much easier to conclude that the employee opposition to the union is entirely voluntary. There are, however, a number of other factors which the Board must consider, and which were elaborated in the evidence of both individuals who testified in support of the application.

19. Otto's Deli is a small delicatessen business employing a total of 13 employees. Steve Duga, the owner, is actively involved in running the business which is managed by Duga himself, and Peter Herweyer, the father of one of the applicants herein. Of the 9 part-time employees on schedule B, 3 are close relatives of Mr. Duga. The applicant Rene Herweyer, the

son of the manager, and Annie Herweyer the manager's wife are 2 of the 3 full-time employees whose names appear on schedule A. Counsel for the union contends that, given this family connection, it is inconceivable that these employees would not have discussed the union with the owner and been influenced by both the economic and family relationship. He further contends that involvement of the owner's family in the discussions about the union as early as the successor rights application, and, in particular, preceding the solicitation of the petition against the union, and the support of family members for the petition itself, make it impossible for those who were not family members to indicate their support for the union. Counsel for the applicants and the intervener, on the other hand, argue that at least 5 of the 12 employees are relatives of the owner or manager, and that this in itself suggests that they would be opposed to the union. In essence, each of the parties urges the Board to draw a different inference from these family relationships, and although the inferences are entirely different neither is unreasonable.

20. We do not think that we should readily draw inferences from the mere existence of a family relationship. In some circumstances, relatives may reasonably be perceived as having a special relationship with the employer which could influence an employee's choice with respect to trade union representation, but we do not think that this is always the case, nor are we prepared to automatically assume that the existence of a family relationship necessarily evidences a community of interest with the employer. It may be that there is a presumption tending in that direction but we are all aware that family relationships do not always exhibit the solidarity which counsel suggests. The involvement of family members is not irrelevant, but it is not the only factor to be considered especially where, as here, the inferences to be drawn from it are unclear. Of equal significance in our view is the general atmosphere prevailing at the work place, and the impact this would likely have on employee perceptions.

21. Steve Duga, the owner has been opposed to the trade union from the beginning and this opposition was shared by Peter Herweyer, his manager. Duga refused to acknowledge the union's rights under section 55, and following the Board's successor rights declaration, has refused to adhere to, or implement the collective agreement by which he is bound. In mid-February, just before the section 55 application (but when he would have been aware that such application was forthcoming) Duga implemented his own health and benefit plan, and gave the employees the impression that this plan would be lost if the union were successful. The employees were advised of the obligation to pay union dues, but no mention was made of the benefits contained in the collective agreement - benefits which were substantially higher than those which were currently in effect. In the first week of June, the 9 part-time employees were granted a wage increase. Almost contemporaneously, the applicant made arrangements for taking a "vote" to test employee support for the union. This vote was conducted by Rene Herweyer. Each employee was asked to write on a piece of paper his support for, or opposition to, the union, and to give that "ballot" to Herweyer. Those who signified opposition were then invited to sign a petition against the union. All of the employees filled in their "ballot" in opposition to the union, and at least 2 employees who were not scheduled to work at the time made a special trip by public transportation in order to record their position. The petition resulting from this process is the one upon which the applicant relies to demonstrate that the employees have all voluntarily signified their opposition to continued union representation.

22. The question before the Board is whether the statement in opposition to the union is voluntary. The evidence in this regard is equivocal. The fact that the employees have no prior union allegiance and were "swept into" the bargaining unit supports an inference that the

petition is voluntary - as does the evidence of early employee opposition to the union, and perhaps the close family relationship of many of the employees. In *Erie Sand and Gravel Ltd.*, [1980] OLRB Rep. June 824 a panel of the Board including the present Vice-Chairman found a termination application to be voluntary where employees of a small business had been swept into a bargaining unit in a situation similar to the present one by operation of section 1(4) of the Act. Here however, there are a number of other factors which must be considered including: the employer's well known opposition to the union; his refusal to adhere to the collective agreement even after the Board's section 55 order; his unilateral introduction of a benefit package and subsequent suggestion that it would be lost if the union were successful; his selective information about the union; and the granting of a wage increase immediately prior to the circulation of a "ballot" and petition in opposition to the union. The unilateral wage increase is of particular concern, for as the Supreme Court of the United States remarked in *NLRB v Exchange Parts Co.* (1964), 375 U.S. 405 (per Harlan J.):

"The danger inherent in well timed increases is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow, and which may dry up if it is not obliged."

None of these factors operate independently and in our view their cumulative effect would be sufficient to suggest to the average employee that their employer actively wished them to reject their union and that they might suffer adverse employment consequences if they chose not to do so. These supervening events complicate the Board's task and outweigh the inference which might otherwise have been drawn from the absence of previous trade union allegiance. The intervener's conduct has made it more difficult for employees to freely express their true wishes with respect to trade union representation, and much more difficult for the Board to conclude that the present expression of employee opposition is truly voluntary. In the circumstances, and after weighing the factors which point in one direction against those which point in the other, we have concluded that we are not satisfied that the forty-five per cent of the respondent's employees in the bargaining units prescribed by the agreement, have voluntarily signified their opposition to the union. The application is therefore dismissed.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I agree with majority that the termination application is timely; however, I am unable to agree with the majority view with respect to the voluntariness of the employee petition supporting the application. My views in this regard will be issued at a later date.

1386-79-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **RCA Limited**, Respondent, v. Canadian Union of Operating Engineers & General Workers, Local 101, Interveners, v. Group of Employees, Objectors

Bargaining Unit – Certification – Engineers voting on whether to be included in larger unit

BEFORE: M. G. Picher, Vice-Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

DECISION OF THE BOARD; November 5, 1980

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7. By its decision dated September 16, 1980, [1980] OLRB Rep. Sept. 1316 the Board ordered the taking of a vote among the professional engineers to determine, pursuant to section 6(3) of the Act, whether a majority of them wish to be included in bargaining unit #1. The vote was taken October 23, 1980. The Board received a letter from Mr. N. M. Finney, an objector, registering his displeasure at not having received notice of proceedings in respect of the vote. While he is not himself an engineer, Mr. Finney did represent an engineer who was among the objectors to the application. Mr. Finney did not claim any ultimate prejudice to the rights of the engineer in question, did not protest the sufficiency of the balloting and did not request a hearing.

8. On the taking of the vote among the professional engineers a majority of them did not express the wish to be included in bargaining unit #1. The Board therefore finds that the following bargaining unit, (hereinafter referred to as bargaining unit #2), constitutes a unit of employees of the respondent appropriate for collective bargaining.

All persons employed by the respondent as professional engineers, save and except Foremen and Administrators, persons above the rank of Foreman and Administrator, students employed during the school vacation periods, students employed during co-operative work terms, and persons covered by existing collective agreements.

9. The Board is satisfied on the basis of all the evidence before it that not more than forty-five per cent of the employees of the respondent in bargaining unit #2 at the time of the application was made, were members of the applicant on October 30, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. The application is dismissed in respect of bargaining unit #2.

0036-80-R Ontario Nurses' Association, Applicant, v. The Regional Municipality of Halton, Respondent

Employee – Whether registered nurses employed in nursing home exercising supervisory or managerial functions

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Dan Anderson, Liz Woods and Cathy Martin for the applicant; Dennis Y. Perlin, Dennis Camm and Jack Carlton for the respondent.*

DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; November 18, 1980

1. The name "Halton Centennial Manor" appearing in the style of cause of this application as the name of the respondent is amended to read: "The Regional Municipality of Halton".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. The applicant has applied to this Board to be certified as the exclusive bargaining agent for all full-time and part-time registered and graduate nurses employed by the Municipality of Halton at the Halton Centennial Manor in Milton, Ontario. The respondent Regional Municipality contends that there is no bargaining unit appropriate for collective bargaining in this case because all of the registered and graduate nurses employed by the Municipality at the Halton Centennial Manor exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and are, therefore, not entitled under the Act to engage in collective bargaining.
5. Given the dispute between the parties over the employee status of the registered and graduate nurses the Board appointed a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of the people in question. Pursuant to the request of the respondent Regional Municipality the Board convened a hearing to enable the parties to make oral representations to the Board concerning the report of the Labour Relations Officer.
6. In *The Cottage Hospital (Uxbridge)* [1980] OLRB Rep. March 304 the Board at pp. 305-306 summarized the approach the Board takes to evaluating whether or not a person exercises managerial functions:

Over the years the Board has developed general guidelines to assist it in evaluating whether an individual exercises managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether

or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1967] OLRB Rep. May 193 *Inglis Limited, supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 444 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12).

Different considerations apply to the work of a second group of persons who may be characterized as having direct effect on the employment relationship or the terms and condition of employment of those in the employ of the organization. Supervisors of employees or those technical experts whose work affects terms and conditions of employment or hiring and employment policies would fall within this group. In determining whether such persons whose work has a direct effect on the employment relationship exercise managerial functions, the Board assesses whether or not they exercise effective control and authority over employees either in direct contact with the employees or through their decisions. In making this evaluation the Board looks to whether the person has, at a minimum, the authority to make effective recommendations relating to conditions of employment. An effective recommendation is a "serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees". (*McIntyre Porcupine Mines Limited, supra*, at 289)

7. As well the Board in *The Cottage Hospital (Uxbridge)* at p. 305 commented specifically on the evaluation of professionals and registered nurses:

When assessing a professional person such as a registered nurse, the Board must distinguish between duties which emanate from an individual's professional training and duties which in fact reflect a managerial function. In *Essex Health Association*, [1970] OLRB Rep. Nov. 824 the Board noted, at p. 825:

Professional or semi-professional employees such as head nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons' professional or technical skills.

In *Peterborough Civic Hospital*, [1973] OLRB Rep. Mar. 154 the Board at p. 156 further commented on factors relevant to the assessment of the employee status of a registered nurse:

Nurses will participate in the decision-making processes which are relevant in the hospital's operations. Nurses are highly trained, and the combination of their training and experience permits them a consultative role which differs from employees in the industrial context: see *Ajax and Pickering General Hospital*, [1970] OLRB Rep. February 1283.

8. The Board has carefully reviewed both the Report and the oral and written representations of the parties. On the basis of all of the evidence and representations the Board concludes that the registered and graduate nurses do not exercise managerial functions within the meaning of section 1(3)(b) of the Act and are employees under the Act. It is readily apparent on the evidence that they do not exercise effective control and authority over members of the nursing support staff in matters relating to labour relations and they do not have the authority to make effective recommendations as that term has been repeatedly interpreted by the Board.

9. The registered nurses, for example, do not take part in hiring or discharging the employees they supervise and at most have only minimal input into decisions management might make to discipline employees. Although they may enforce rules by, for example, telling someone not to smoke in a no smoking area, they do not make recommendations regarding the disciplining of an individual who breaks such a rule. Nor do they have any input into establishing wage rates for people under their direction apart from possible comments on evaluation forms they fill out from time to time.

10. Although the registered nurses fill out evaluation forms for people they supervise, the evidence does not support the conclusion that any aspect of their evaluation could be characterized as an effective recommendation, that is, a serious recommendation that is usually acted upon which would affect the terms and conditions of the employment of the person being evaluated. If, for example, the person evaluated does not agree with the evaluation, then, instead of signing the evaluation, that person will meet with management for further discussion. The Board concludes on the evidence that the evaluation form is just one item among several considered by management in making its own decisions about matters affecting the employment of the staff supervised by the registered nurses.

11. Additionally, while the registered nurses attend meetings with management the evidence does not support the conclusion that their participation in these meetings could be properly characterized as a managerial function. The minutes of these meetings detail the topics discussed and set out general rules and guidelines to be followed. They do not, however, reveal what role the registered nurses play at these meetings or indicate what input, if any, they have in the establishment of rules. In the minutes of one meeting, for example, the following direction is given, presumably to the registered nurses: "If aide stays too long in dining-room may be sent home *after first* warning. If aide sent home Mrs. Alexander [the Director of Nursing] to be advised, she will call aide re return to work." The sending home of a nurses' aide in this situation cannot be viewed as a managerial function. Firstly, there is no indication that the registered nurses had any input onto the establishment of this guideline. Secondly, when it is carried out it is within strictly prescribed limits. Thirdly, the extent of discipline that might

result from being sent home is left within the control of Mrs. Alexander who decides when and under what conditions the aide will return to work. In summary, the minutes of these meetings do not support the conclusion that the registered nurses make effective recommendations in matters that affect the employment relationship.

12. The authority of the registered nurses to check and correct the work of those they supervise, their responsibility for the health and welfare of the resident patients, their duty to call in people off a master time sheet prepared by management to ensure sufficient staff and their ability to assign work and grant casual time off do not, in the context of this case, suggest that they have effective control and authority over the people they supervise in matters relating to labour relations. Their authority in these areas is the natural result of their professionalism and extensive training. It does not, however, serve to classify them as part of management.

13. With respect to the registered nurses' role in the grievance procedure for the nursing support staff, the Board cannot at this time evaluate whether they will be exercising a managerial function in this regard once the support staff collective agreement is in place. Although the grievance procedure clauses of that collective agreement had been agreed to, the collective agreement as a whole had not been finalized either at the time of the hearing, or, more importantly, at the date of the registered nurses' application for certification which is the point in time at which the Board assesses the evidence relating to the duties and responsibilities of anyone in dispute. Furthermore, the Board could not be guided solely by the words in the grievance procedure provisions. In this case it would have to gain an appreciation of how the grievance procedure provisions were applied in practice in order to evaluate the quality of the registered nurses' input.

14. For the reasons set out above the Board finds that the registered and graduate nurses affected by this application are employees under the Act and are entitled to participate in collective bargaining.

15. Having regard to the agreement of the parties to take effect in the event of a finding by the Board that the registered and graduate nurses are employees, the Board finds that all registered and graduate nurses employed in a nursing capacity by the Regional Municipality of Halton, at Halton Centennial Manor in Milton, Ontario, save and except the Assistant Director of Nursing, persons above the rank of assistant Director of Nursing and persons regularly employed for not more than 24 hours per week, constitute a unit appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 were members of the applicant on April 16th, 1980, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant in respect of bargaining unit #1.

18. Having regard to the further such agreement of the parties the Board finds that all registered and graduate nurses regularly employed for not more than 24 hours per week in a nursing capacity by the Regional Municipality of Halton, at Halton Centennial Manor in Milton, Ontario, save and except the Assistant Director of Nursing, and persons above the

rank of Assistant Director of Nursing constitute a unit appropriate for collective bargaining (hereinafter referred to as bargaining unit #2.).

19. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2 were members of the applicant on April 16th, 1980, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A certificate will issue to the applicant in respect of bargaining unit #2.

DECISION OF BOARD MEMBER J. A. RONSON:

I dissent for reasons to follow.

0048-80-U United Brotherhood of Carpenters & Joiners of America, Local 3054, Complainant, v. Selinger Wood Limited, Robert Selinger, Respondents

Collective Agreement – Duty to Bargain in Good Faith – Parties agreeing to memorandum - Ratification vote held prior to enactment of Bill 89 – Only one union member voting – Whether employer properly refusing to sign agreement

BEFORE: George W. Adams, Chairman, and Board Members T. G. Armstrong and W. F. Rutherford.

APPEARANCES: *J. Melnitzer, A. Salvona and T. Harkness for the complainant; Robert Selinger for the respondents.*

DECISION OF THE BOARD; November 12, 1980

1. This is a complaint under section 79 of *The Labour Relations Act* alleging a violation of section 14. Section 14 of *The Labour Relations Act* provides:

The parties shall meet within 15 days from the giving of notice or within such further period as the parties agree upon and *they shall bargain in good faith and make every reasonable effort to make a collective agreement.* [emphasis added]

1. The facts in this matter are not in dispute. A previous agreement affecting this bargaining unit expired December 12th, 1978. Notice to bargain was served on the respondent company's predecessor on September 14th, 1978. On or about February 26th, 1979 the complainant applied to the Ontario Labour Relations Board for a declaration that the respondent, Selinger Wood Limited, was a successor employer to Goderich Manufacturing Company

1.02 – except that a maximum of 5 supervisory or maintenance personnel shall be permitted.

4. It is also agreed that the solicitors for the complainant trade union prepared a formal collective agreement on June 16th, 1980 based on this memorandum of settlement and that Adam Salvona, a representative of the trade union, presented this document to the respondents for signature on the same date. It was also agreed that Salvona was advised some time in early July that the respondents refused to execute the collective agreement because they believed it had not been properly ratified. The evidence is that the one remaining member employed in the bargaining unit approved or ratified the agreement between the parties on June 13th, 1980.

5. Before this Board, the respondents relied upon the provisions of Bill 89 requiring that all employees employed in the bargaining unit be permitted to participate in any ratification vote. It is undisputed that a large number of employees in the bargaining unit who are not members of the complainant trade union were not notified of the June 13th meeting at which the agreement was ratified. Counsel for the trade union submits that Bill 89 does not affect the facts at hand in that Bill 89 did not receive royal assent until June 17th, 1980. Alternatively, he submits that the memorandum of settlement did not require ratification and that the complainant trade union is entitled to require the respondent company to execute the formal collective agreement without ratification. He further submits that the respondents have no standing to even raise this issue before the Board and thereby inquire into the internal workings of the trade union.

6. As the Board advised the parties at the hearing, it is our finding that on the facts before us the respondent company had violated section 14 of *The Labour Relations Act* and to remedy this violation it is directed to execute the collective agreement presented to it on June 16th, 1980 (see *Municipality of Casimer, Jennings, and Applyby*, [1978] OLRB Rep. June 507). While Bill 89 has amended *The Labour Relations Act* to provide “all employees in a bargaining unit, whether or not such employees are members of the trade union, are entitled to participate in a vote to ratify a proposed collective agreement”, this amendment was not in effect at the time the complainant trade union sought to have the one remaining member of the bargaining unit ratify the aforementioned memorandum of settlement. And, of course, prior to the amendment, nothing in *The Labour Relations Act* explicitly required a trade union to permit employees who were not members to participate in a ratification vote. The only requirement was that any ratification vote be conducted in such a manner that a person expressing his choice could not be identified with the choice expressed.

7. For all of the foregoing reasons and findings the Board issues the following remedy:

- a) The Board declares that the respondent company violated section 14 in refusing to execute the agreement presented to it on June 16, 1980;
- b) The Board directs the respondent company to execute the aforesaid collective agreement reflecting as it does the memorandum of settlement arrived at between the parties;
- c) The Board directs the respondent company to pay damages

together with interest to all bargaining unit employees for its failure to bargain in good faith and the Board retains jurisdiction to determine such damages on the application of the complainant;

- d) The Board directs the respondent company to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places at all its places of business where bargaining unit employees are employed in Ontario, including all places where notice to employees are customarily posted and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant trade union to satisfy itself that this posting requirement has been and is being complied with;

1220-80-R Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Siegfried Krieser Industries Limited**, Respondent, v. Group of Employees, Objectors.

Petition – Senior employees in unit circulating petition – Manager calling meeting suggesting lay-off if union successful – Press clippings about massive lay-offs posted on bulletin board – Petition not voluntary

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members E. J. Brady and H. Simon.

APPEARANCES: *K. Petryshen, V. Knap and A. Bryan, for the applicant; R. D. Perkins, E. Martenfeld and F. Skurka, for the respondent; and L. D'Oliveira and P. Mosychuk, for the objectors.*

DECISION OF THE BOARD; November 24, 1980

1. This is an application for certification.

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4. Having regard to the agreement of the parties, the Board finds pursuant to section 6(1) of the Act, that the following two bargaining units are units of employees appropriate for collective bargaining:

Bargaining Unit #1

All employees of the respondent at its plant at 41 Colville Road in the Municipality of Metropolitan Toronto known as Metal Bending & Furniture Company, save and except foremen, persons above the rank, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week.

Bargaining Unit #2

All employees of the respondent at its plant complex on Fenmar Drive in the Municipality of Metropolitan Toronto, save and except foremen, persons above that rank, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week.

For the purposes of clarity, the Board notes that the Fenmar complex includes buildings at 38 Fenmar, 39 Fenmar, and 60 Signet Road (175 Fenmar).

5. In support of this application for certification, the trade union filed documentary evidence of membership on behalf of a number of employees employed in bargaining unit #1 and bargaining unit #2. The documentary evidence took the form of membership cards which include a combination application for membership and an attached receipt. These cards are signed by the employees, and the receipts are countersigned and indicate that a payment of one dollar has been made within the six month period immediately preceding the terminal date for this application. The documentary evidence is supported by a properly completed Form 8 statutory declaration and demonstrates that in both bargaining unit #1 and bargaining unit #2 the union has a level of membership support in excess of that required for certification without recourse to a representation vote. Having regard, therefore, to the statutory definition of "member", and the statutory prescriptions concerning membership, as well as the Board's power to prescribe the form of such evidence, the Board is satisfied, on the basis of the material before it, that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made, were members of the applicant on September 26, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. There was also filed with the Board two statements of desire, or "petitions", signed by employees and indicating that they wished to oppose the certification of the applicant. These statements included the names of certain individuals who had previously signed membership cards, had paid \$1.00 in respect of membership fees, and were, therefore, "members" of the union within the meaning of section 1(1)(j) of the Act. These "members" had had a purported change of heart, and now allegedly no longer wished to support the applicant's certification. However, the number of such individuals in bargaining unit #1 was insufficient to affect the applicant's right to certification for that unit. Accordingly, the Board is satisfied that a certificate should issue to the applicant in respect of bargaining unit #1. In bargaining unit #2, however, it was apparent that if all of the union's members who signed the petition had had a *voluntary* change of heart, the Board would exercise its discretion to order a

representation vote (although, it might be noted, that if any of those individuals signed involuntarily, the union's unequivocal membership support entitle it to certification without recourse to a representation vote).

7. Statements of desire, or "petitions", are not regulated by the Act as directly, or precisely, as union membership evidence. There is no statutory definition equivalent to section 1(1)(j), nor is there any requirement for a monetary payment, or a confirmatory statutory declaration similar to Form 8. However, the existence of statements of desire appears to be contemplated by section 92(2)(j) of the Act and Rule 48 of the Rules of Practice and in any event, the Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary, complies in all respects with Rule 48, and contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt that the union's members continue to support its certification. The Board must be satisfied however, that when these members signed the petition evidencing an apparent change of heart, they were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer or could result in reprisals.

8. It must be clear that the circulation of a petition is free from the actual, or perceived, influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the trade union only a short time before; and while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. Frequently, such petitions are openly circulated on the employer's premises during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with the employer. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign a petition because of employer conduct suggesting that his continued support for the union will result in loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as truly voluntary for in both cases, it results from a perceived threat to his job security. It is for this reason that the Board undertakes the inquiry into the origination and circulation of the petition contemplated by Rule 48(5) in order to satisfy itself that the statement in opposition to the trade union is voluntary. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

"The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union, represents a voluntary change of heart. The Board recognizes that the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matter is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

'In view of the responsive nature of his relationship with his em-

ployer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

Having regard to the sensitive nature of the employer-employees relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. No. 813 and the cases cited therein.)"

9. The petition document at the Fenmar location was prepared by Peter Mosyschuk and circulated by Mr. Mosychuk and Mr. W. Einesman on company premises during working hours. Neither Mr. Mosychuk nor Mr. Einesman exercise managerial functions, although Mr. Einesman (who has been employed by the respondent for sixteen years) told the Board that a number of employees did not wish to talk to him about the union because they thought he would go "straight to the boss to tell on them". This perceived association and identity of interest with management may also be relevant in the case of William Nickel – another senior employee who signed and was associated with the petition. The union argued that Mr. Nickel exercises managerial functions and two witnesses, John Carvallo and Carlo Pinto testified that they regarded him as a supervisor. We are satisfied however that Mr. Nickel does not exercise managerial functions and could not reasonably have been regarded as being a member of management. On the other hand, there is no doubt that these old and valued employees had a special relationship with management (as is not unusual in most small businesses) and that more junior employees might reasonably be concerned about openly expressing pronoun sentiments in their presence. While there was no evidence that these employees enjoyed special privileges, it might be noted that Mr. Einesman on Mr. Nickel's suggestion and without consulting his foreman or asking permission was able to take a day off work to attend the Board hearing. We wish to make it clear however that there is no evidence of *actual* management involvement in the origination preparation or circulation of the petition nor is there any evidence that the respondent actively assisted the petitioners or sought

to use this vehicle as a means of undermining the union's position. There were however a series of managerial actions which in our view bear upon the voluntariness of the petition.

10. On September 17, Edward Martenfeld, the plant general manager, held an "impromptu" meeting attended by most of the employees in the office of Bruno Prescowitz another management official. Martenfeld told the Board that he had heard rumors of the union organizing campaign, was profoundly disturbed, and felt that it was necessary to speak to the employees. Martenfeld was concerned, disappointed, and apprehensive about the potential impact on the company if the employees chose a trade union to represent them. He had no previous experience with trade unions, regarded a union as a negative and destructive force, and felt that it was unnecessary in the context of his business. All of these views were conveyed to the employees.

11. The company had been experiencing some financial difficulties but, for the most part, had been able to avoid prolonged lay-offs. This business situation was reviewed by Martenfeld who prefaced his remarks by indicating that if the employees wanted a trade union he would be prepared to work with it. However, he went on to say that if the employees opted to support a trade union, it would be a "different ball game". The way a union worked, he said, people would have to be laid off. The clear impression left with the employees (and this was confirmed by all of the employees who gave evidence including the petitioners) was that if the employees opted for a trade union there would be lay-offs. Rumors also began to circulate concerning a possible plant closing if the union's certification application were successful. Nickel told John Carvallo that if a trade union came in the boss would "lock the door". Even if Martenfeld indicated that he was prepared to work with the union, and honestly believed that a formal job classification system might impair the company's ability to retain employees, there is no doubt that the employees were told that continued support for the trade union would prejudice their job security.

12. The situation was exacerbated by a number of press clippings which Mr. Martenfeld posted on the board used by the company for posting notices to employees. Mr. Martenfeld explained that, after learning of the organizing campaign, he cut out and posted any news items which reflected adversely on unions or might bear upon the employees' situation if they chose to support the union. Pertinent paragraphs were apparently underlined. Some of these newspaper stories and letters to the editor merely express opposition to trade unions linking them with "featherbedding", lethargy, scandal, corruption, crime, radicalism, and in one case treason. Others however are more directly linked to Martenfeld's concerns and those of the employees. One headline reads: "ONE HUNDRED LOSE JOBS AS TORONTO PLANT CLOSED". Another described the circumstances of a two month lockout. A third noted that Massey Ferguson was in the midst of a three-month shutdown and had laid off hundreds of employees in Brantford and Toronto. A letter which was entitled "better low than no pay" suggested that wage increases result in fewer jobs and that it was better to have a smaller income than no income at all. Since these clippings clearly emanated from management and followed Martenfeld's speech linking trade union representation with lay-offs, it is not surprising that employees were concerned that continued support for the trade union would prejudice their job security. Continued support for the union would threaten their jobs; and as we have already pointed out, all of the employees who gave evidence confirmed that this was the company's message.

13. Can the Board in all of these circumstances be satisfied that when the employees,

who had previously signed membership cards, signed the statement of desire, they were expressing a genuine and voluntary change of heart? Or were they motivated by a concern for their job security, or a fear that their failure to signify their opposition would be communicated to their employer and might result in adverse employment consequences? In our view, the latter is more likely. Having regard to the totality of the evidence, we are not satisfied that the petition represents the voluntary wishes of the employees (and in particular, those employees who had already signed membership cards), and we are not prepared to give it any weight or to exercise our discretion to order a representation vote. The Board, therefore, is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2 were members of the applicant on September 26, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant in respect of bargaining unit 2.

1391-80-R Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., Applicant, v. The Corporation of the County of Simcoe, **Simcoe Manor Home for the Aged**, Respondent, v. Group of Employees, Objectors

Petition – Section 79 – Director of Nursing suggesting union certification would lead to less flexibility – Suggestion made to friend of Director – Not perceived as a threat – Employer engaging in improper hiring practice – Whether affecting voluntariness – Posting ordered

BEFORE: M. G. Picher, Vice-Chairman, and Board Members E. C. Went and A. Hershkovitz.

APPEARANCES: *Jeffrey Egner, Joe Aggimenti, Sharon Ball and Kathy Crane for the applicant; R. A. Werry for the respondent; Jean Andrews, Sharon MacDonald and Pearl Stelmachowicz for the objectors.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER E. C. WENT; November 12, 1980

1. This is an application for certification.

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6. A petition was filed in a timely manner in opposition to the application. The overlap of employees who signed the petition having previously signed union membership documents was such as to cause the Board to conduct its usual inquiry into the origination and circulation of the petition. Having regard to the evidence the Board is satisfied that the petition represents the voluntary expression of the wishes of the employees who signed it. In this situation the Board would normally seek the confirmatory evidence of a representation vote.

7. The union submitted that in the circumstances of this case the wishes of the employees could not be disclosed in a secret ballot vote, and that the Board should grant certification pursuant to section 7a of the Act.

8. The union's submission is grounded principally on statements attributed to Ms. Velda Lewis, the Director of Nursing in the respondent's home. The uncontradicted evidence of Mrs. Sharon Ball, an employee instrumental in the union campaign, is that Ms. Lewis and she are friends, and that they frequently have lunch together. On one occasion Ms. Lewis asked Mrs. Ball whether she supported the union. On receiving a positive response Ms. Lewis commented, in a conversational way, that a union presence in the home would lead to the introduction of punch clocks and a reduction in the flexibility of departure times that the employees enjoyed. Later in the day she also commented to Mrs. Ball that the employer would receive a list of employees who were members of the union. While this last statement causes the Board concern, we are satisfied that it was not intended as a threat and was recognized by the few employees who overheard it for the idle comment that it was. The next day Ms. Lewis apologized to Mrs. Ball, whose own evidence is that Ms. Lewis' comments were made in a matter-of-fact tone and not in a threatening way. Mrs. Ball expressed her own opinion that the Director of Nursing is indifferent about whether a union is established in the home. The evidence of Mrs. Ball and other employees called by the union contradicts the suggestion of the union that there was a widespread rumour among the employees to the effect that their employer would receive a list of all employees who supported the union.

9. The unchallenged evidence also establishes that at the time of their hiring interview at least two employees were asked by representatives of management what their views were about unions. When they responded that they didn't know much about unions they were told that was good because a union would not be welcome in the home. That kind of inquiry *in a hiring interview* can only be seen as intended to intimidate or unduly influence employees to refrain from exercising their rights under *The Labour Relations Act*. It easily creates in an employee the impression that the avoidance of union activity is an implied condition of his or her employment. It is a breach of sections 56 and 58(b) of the Act that cannot be condoned by this Board. We should, as far as possible, remedy any lingering effect that the employer's unlawful conduct in this regard may have on the employees in a representation vote.

10. The Board is satisfied that a representation vote can be taken in the circumstances of this case. The breaches of the Act by the employer that were established by the union are not acts which in the Board's opinion deprive the respondent's employees of the ability to freely express their wishes in a secret ballot vote. The fact that the section 7a application has not succeeded does not, however, foreclose the Board from making a remedial order designed to redress the employer's unfair labour practices.

11. The evidence of intimidation of two employees at the time they were hired, one in 1977 and the other in 1980, was not challenged or contradicted by the respondent. The employer's silence on this aspect of the evidence causes a natural concern about the extent to which other employees were subjected to the same kind of "orientation" when they were hired. Employees voting on an application for certification should not, because of their employer's undue influence, be left in any doubt about the legitimacy of being represented by a trade union or about any other rights which they have under *The Labour Relations Act*. We are satisfied that a remedial order is appropriate to advise employees of their rights and rectify the breaches of the Act committed by the respondent.

12. The respondent is therefore ordered to cease and desist from interrogating employees or prospective employees with respect to their views on union representation, and to refrain from the imposition of conditions of employment, expressed or implied, that would intimidate or unduly influence employees from exercising their rights under *The Labour Relations Act*.

13. The respondent is further directed to post copies of the attached notice marked "Appendix" after it is signed by Edward Boynton, Administrator of the respondent, in conspicuous places on its premises in Beeton, where it will be reasonably accessible to all employees, including all places where notices to employees are customarily posted. The notice shall be posted forthwith until the representation vote is taken and reasonable steps shall be taken by the respondent to insure that the notices are not altered, defaced or covered by any other material. Reasonable access to the respondent's premises shall be given by the respondent to two representatives of the applicant to satisfy itself that this posting requirement has been complied with.

14. A representation vote shall be taken. All employees of the respondent in the bargaining unit on the 24th day of October, 1980 who do not voluntarily terminate their employment or who are not discharged for cause between the 24th day of October, 1980 and the date the vote is taken will be eligible to vote.

15. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

16. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER AL HERSHKOVITZ:

1. Evidence was brought before the Board that at least two employees at the time of being interviewed for employment were questioned by management as to what their views were about unions. When they replied that they didn't know much about unions they were told that that was good because a union would not be welcome at the home. They were subsequently hired. It was further established that Ms. Velda Lewis was present at some of these interviews.

2. I concur with my fellow Board Members when they declare that the kind of inquiry in a hiring interview can only be seen as intended to intimidate and unduly influence employees to refrain from exercising their rights as set out in section 3 of *The Labour Relations Act*, which states that "every person is free to join a trade union of his own choice and to participate in its lawful activities" which is clearly a violation of sections 56 and 58 of the Act.

3. On the basis of this evidence, counsel for the applicant pointed out that this is a clear violation of the Act and asked that the Board grant certification pursuant to section 7a.

4. The majority of my fellow Board Members decided to deny this request.

5. I dissent from the majority decision in that I deem such action on the part of management as direct interference in the rights of the employees to the freedom to join a trade union of their own choice.

6. On the basis of the unchallenged evidence presented to the Board I would grant certification; however, failing that I concur with the Board's decision for remedial action to be taken.

7. In dealing with a petition filed by Jean Andrews, Sharon MacDonald and Pearl Stelmachowicz it was clearly established that Ms. Velda Lewis, Director of Nursing in the respondent's home did while having lunch with Sharon Ball and several other employees of the bargaining unit engage them in a discussion of their support of the union. On receiving an affirmative response, Ms. Lewis declared that the presence of a union in the home would lead to the introduction of the use of punch clocks and a reduction in the flexibility of departure time. In the presence of Edith Petley, Janice McKenzie and Heather, Ms. Lewis stated "that if you think this is confidential, it won't be. We will get the list of names that signed for the union." On October 10th Ms. Lewis phoned Mrs. Ball and stated that she wanted to apologize, that she hoped she didn't hurt her feelings and that she didn't realize that she intimidated her. When questioned about Ms. Velda Lewis' relationship with other employees, Mrs. Ball declared that there was a friendly relationship. Mrs. Ball's evidence was straightforward and credible.

8. It was alleged that the petitioners reiterated the statements made by Velda Lewis during their solicitation of signatures. Let me recapitulate the evidence as presented:

- (1) The statement of Velda Lewis that time clocks would be installed.
- (2) That there would be a reduction of flexible departure time.
- (3) That the employer would receive a list of all union members.
- (4) These statements were used by the petitioners during their solicitation of signatures.
- (5) The expressed animus against a union coming into the home as stated by management during interviews of job applicants. Ms. Lewis was present during these interviews.

9. While my fellow Board Members minimize the seriousness of Ms. Lewis' statements based on Mrs. Ball's admission that she was on friendly terms with Velda Lewis, I submit that precisely because of this relationship Mrs. Ball and all others who were aware of these statements viewed them as serious since they came from a person who was a friend but nevertheless is in a managerial position and thus those statements would have considerable weight.

10. Because of the accumulated evidence I conclude that the employees will not be in a position to vote free of the fear of dire consequences. Furthermore, I would dismiss the petition as not disclosing the true wishes of the employees who signed it, and since there are sufficient cards signed voluntarily by the employees, grant a certificate.

1736-80-U Sudbury Construction Association, Spiers Industrial Contractors Inc., Spiers Brothers Limited, ROMM Construction Company Limited, Applicants, v. Sudbury Building and Construction Trades Council, L. Popovich, The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of United States and Canada, Local 800, and M. Zangari, Respondents

Practice and Procedure – Strike – Whether Board reconsidering abridging of time limits – Whether union, business agent or council of unions calling or authorizing strike

BEFORE: R. A. Furness, Vice-Chairman.

***APPEARANCES:** R. A. Werry, H. Martin, J. Rudack and D. Lloyd for the applicants; Jeffrey Egner and Mike Zangari for The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of United States and Canada, Local 800, and M. Zangari; no one appearing for Sudbury Building and Construction Trades Council and L. Popovich.*

DECISION OF THE BOARD; November 17, 1980

1. The applicant has applied for relief under section 123 of *The Labour Relations Act* and has alleged that from May 29, 1979, and, intermittently, to the present, unlawful strikes have occurred with the most recent unlawful strike commencing on November 4, 1980, and continuing to the present. The applicants are seeking a direction against the Sudbury Building and Construction Trades Council (the “Council”) and its president L. Popovich because of the alleged support of the Council for the alleged unlawful actions of its affiliates.

2. The applicants have requested that the Board make the following direction:

(a) That the respondents cease and desist from calling or authorizing an unlawful strike at the Rio Algom Ltd. project at Elliott Lake.

(b) That the respondents cease and desist from counselling, procuring, supporting or encouraging an unlawful strike at the Rio Algom Ltd. project at Elliott Lake.

(c) That the respondents cease and desist from any act to cause an unlawful strike at the Rio Algom Ltd. project at Elliott Lake.

(d) That each and every affiliate of the respondent Building and Construction Trades Council be directed not to do or cause to be done any of the acts referred to in (a), (b) or (c) hereof.

3. The Board abridged the time for filing replies to any time prior to the hearing. The respondents, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of United States and Canada, Local 800 (“Local 800”) and Michael Zangari have requested the Board to reconsider its decision in this regard. The Board considered the representations before it and held that there was no reason to reconsider its

decision with respect to the abridgement. Local 800 and Mr. Zangari raised objections with respect to the notice they received with respect to this application. While it appeared that these respondents had not received Form 76, Notice of Application for a Direction Under Section 123 of The Act and of Hearing, Construction Industry, or a copy of the decision dated November 12, 1980 (which abridged the time for the filing of replies), they had actual notice of this application and had an opportunity to file a reply before the hearing. While the time for preparing representations by Local 800 and Mr. Zangari was not as long as they would have wished; the Board was satisfied that, having regard to the nature of the application and the allegations contained therein, Local 800 and Mr. Zangari had a reasonable opportunity to prepare their response with respect to this application. In the Board's view, the good character and propriety of conduct were not in issue within the meaning of section 8 of *The Statutory Powers Procedure Act*, S.O., 1971, c. 47. Local 800 and Mr. Zangari also raised issues with respect to the particulars filed by the applicants. The Board held that the particulars sufficiently set forth the particulars of the allegations which Local 800 and Mr. Zangari were required to meet.

4. Rio Algom Ltd. is engaged in reactivating five mines in the general area known as Elliott Lake. Apparently there have been a series of strikes in connection with this work. Various trade unions have been involved in disputes in connection with this work, including Local 800. However, not all of these disputes have involved Local 800. These disputes have arisen out of diverse causes such as jurisdictional disputes, the awarding of work by Rio Algom Ltd. to contractors whose employees are either non-unionized and the awarding of work by Rio Algom Ltd. to contractors which have collective agreements with trade unions which are not affiliated with the Council. This has led to the filing of a series of applications under section 123 of the Act. However, all of the applications have been settled by the parties thereto with the exception of one application where the Board issued a direction with respect to the members and officers of Local 1687 of the International Brotherhood of Electrical Workers.

5. In the instant application the evidence established that members of Local 800 who are employees of Spiers Brothers Limited engaged in an unlawful strike commencing on November 4, 1980. However, the evidence does not establish that either Local 800 or Mr. Zangari called or authorized or threatened to call or authorize or counselled or procured or supported or encouraged an unlawful strike. The evidence established that Mr. Zangari relayed the concern and anger of some of the members of Local 800 who were working in the general area known as Elliott Lake. In fact, Mr. Zangari sought to avert an unlawful strike which had been threatened by some of the members of Local 800. Unfortunately, Mr. Zangari was unable to prevent this unlawful strike and was genuinely aggrieved when the unlawful strike occurred. Mr. Zangari sought to lay charges against the instigators of the unlawful strike and to find replacements for the strikers. Mr. Zangari did inform representatives of the Association and Spiers Brothers Limited of his intention to have the members of Local 800 work in compliance with its collective agreement. The Board finds that this meant that members of Local 800 would not assist in the performance of work which they were neither trained, qualified nor licensed to perform. The Board finds that Mr. Zangari neither instructed nor advised his members not to handle certain pipe. The application in so far as it relates to Local 800 and Mr. Zangari is dismissed.

6. The Board now considers the application in so far as it concerns the Council and its president Mr. Popovich. Two meetings were held between representatives of the Council and

representatives of the applicants and Rio Algom Ltd. in September and October of this year. On those occasions matters of concern to the Council and its affiliates were discussed. The Council pointed out why certain problems had occurred in connection with reactivation of mines by Rio Algom Ltd. It was agreed by the witnesses that the tone of these meetings was conciliatory. There was no evidence that either the Council or Mr. Popovich called or authorized or threatened to call or authorized or counselled or procured or supported or encouraged an unlawful strike. The fact that some of the affiliates of the Council have in the past been named as respondents in proceedings under section 123 does not in itself implicate either the Council or Mr. Popovich in any unlawful strikes which may have occurred. This application is also dismissed in so far as it relates to the Council and Mr. Popovich.

1154-80-R United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., Applicant, v. Textile Trim Canada Limited, Respondent, v. Group of Employees, Objectors

Petition – Circulation on company premises during working hours by employee regarded as supervisor – During hiring process employer establishing strong opposition to unions – Manager calling meetings and interviewing employees about possibility of plant closing – Petition not voluntary

BEFORE: R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *M. Levinson and others for the applicant; Leon Paroian, Q.C. and others for the respondent; Jean Vandendriessche and others for the group of employees.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER M. J. FENWICK.

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Town of Delhi, Ontario, save and except forepersons, person above the rank of foreperson, and office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. In support of this application which was filed on September 10, 1980, the trade union filed documentary evidence of membership on behalf of a number of employees. The combination applications and receipts were signed between September 6 and 17, 1980, with the vast majority of these documents being signed during the three day period from September 6th to 8th inclusive. This documentary evidence is correct in all respects, is supported by a properly completed (Form 8) Declaration Concerning Membership Documents and

demonstrates a level of membership support in excess of that required for certification without recourse to a representation vote.

5. There was also filed in this matter, in timely fashion, four documents (hereinafter referred to as the “petitions”) expressing opposition to the applicant trade union. As indicated above, in the absence of the petitions, the applicant would be entitled to be certified without a representation vote. However, the overlap between persons who signed membership cards in the applicant and the persons who signed the petitions is sufficient that the Board would generally exercise its discretion to direct a representation vote if the Board were satisfied of the voluntariness of the petitions. Accordingly, the Board conducted its usual inquiry into the origination and circulation of the petitions.

6. The legal basis and effect of petitions and the Board’s practice concerning same were explained in *Peacock Lumber Ltd.*, [1979] OLRB Rep. May 423 as follows:

“7. Neither ‘statements of desire’ nor ‘petitions’ are mentioned in *The Labour Relations Act* itself, but they do appear to be contemplated by Rule 48 of the Rules of Practice (R.R.O. 1970 Reg. 551 as amended.) The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petition is voluntary, complies with Rule 48, and contains the signatures of a sufficient number of persons who have previously signed membership cards, that there is some doubt whether the union’s ‘members’ continue to support its certification. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043 (at p. 1046) the Board explained the effect of a petition in the following way:

16. Having regard to the statutory definition of ‘member’ and the provisions concerning membership evidence, the Board is satisfied that more than fifty-five per cent of the employees in bargaining unit #1 are ‘members’ of the union, and that therefore the union may be certified without a representation vote. However, section 7(2) of the Act gives the Board the discretion to order a representation vote where it considers it advisable to do so. The practice of the Board is to exercise this discretion in favour of ordering a representation vote where a sufficient number of the employees, who have been found to be union ‘members’, subsequently indicate that they no longer wish to support the union. When faced with this ‘change of heart’, the Board will order a representation vote in order to satisfy itself that, in addition to meeting the statutory membership support requirements, the union continues to enjoy the support of its members:

17. The ‘change of heart’ will often take the form of a petition or statement of desire indicating that the signatories no longer wish to support the union. There is no specific form required for such petition, but it must comply with the requirements of Rule 48, and clearly indicate the member’s change of heart. Typically, the petition in opposition to the union is signed by members who have indicated their support only a few days before. Moreover, while an

employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. In these circumstances an employee may sign a petition out of fear that his refusal to do so will be made known to his employer rather than a genuine opposition to the union. It is for this reason that the Board undertakes the enquiry into the origination and circulation of the petition contemplated by Rule 48(5), in order to satisfy itself that the statement in opposition to the union is truly voluntary.

18. The statement of desire filed in opposition to the application bears a sufficient number of signatures which correspond to the signatures of persons in the full-time bargaining unit who signed membership cards that, if proven to be a voluntary expression, will cause the Board to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote...

8. Rule 48 casts upon the petitioners an onus to call evidence as prescribed by 48(5), and to generally demonstrate that the petition is voluntary. The Board must be satisfied that when the members signed the petition, they were evidencing a genuine change of heart and were not motivated by a concern that their failure to sign would be communicated to the employer, or could result in reprisals. It must be clear that the circulation of a petition is free from the actual, or perceived, influence of management. In this respect the Board takes the same approach as it does with union membership evidence. (See, for example, *Veres Wire*, [1976] OLRB Rep. July 337 where the involvement in a union organizing campaign of a person reasonably perceived to be managerial, prompted the Board to reject the union's membership evidence because it was not satisfied that the 'members' had signed voluntarily.) In *Radio Shack, supra*, the Board commented:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the 'sudden change of heart' by those who signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influence, obvious or devious, which may operate or impair or destroy

the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813 and the cases cited therein.)"

7. One of the aforementioned four petitions reads as follows:

"Dear Sir or Madam

I do not want to JOIN THE
UNION

TEXTILE TRIM CANADA Ltd."

Neither the person whose signature appears on that petition nor any other person who testified from personal knowledge and observation as to the circumstances concerning the origination of that petition and the manner in which the signature was obtained, appeared at the hearing held by the Board in Toronto on October 3, 1980 or at the continuation of the hearing held in London on October 29 and 30, 1980. Since the requirements of Rule 48(5) have not been fulfilled, the Board attaches no weight to that petition.

8. Evidence was adduced concerning the origination and circulation of the remaining three petitions. One of them was in the form of a letter signed by Fenney Moore Lee, a sewing machine mechanic employed by the respondent. Mr. Lee testified that he decided to write the letter after reading the "green sheet" (Form 5 Notice to Employees of Application for Certification and of Hearing) which was posted by the respondent on September 19, 1980. A letter in opposition to the applicant was also written, signed and sent to the Board by Elizabeth Brown. Ms. Brown is classified as a "Lead Person" on Schedule A of the respondent's Form 9 Reply to Application for Certification and is included in the bargaining unit set forth above.

9. The remaining petition in opposition to the application contains seven signatures. It was prepared and circulated by Jean Vandendriessche, a sewing machine operator employed by the respondent. Ms. Vandendriessche testified that she obtained three signatures in the plant cafeteria between 8:00 and 9:00 a.m. on September 22, 1980. Although those three persons commenced work at 8:00 that morning, the evidence indicates that it was not unusual for them to be in the cafeteria for a few minutes during the first hour of work since employees are permitted to go to the cafeteria anytime they wish to smoke a cigarette. (Smoking is not permitted in the work area of the plant.) Ms. Vandendriessche further testified that she obtained the remaining four signatures that same morning "right in the plant where we do our sewing at the machines". She stated that she "went from machine to machine to get those signatures" and was accompanied by one of the other persons who signed the petition. It was also her evidence that her "supervisor" Elizabeth Brown was in the plant at the time. Ms. Vandendriessche stated that she did not ask Ms. Brown to sign the petition because the latter had told her that she (Ms. Brown) could not talk about the union. When asked by the Board whether, to the best of her knowledge, any member of the management was aware that she was circulating the petition, Ms. Vandendriessche answered: I'm sure Liz (Ms. Brown) was. She probably saw me when I was getting the ones in the cafeteria. She didn't say anything to me about it."

10. Ms. Brown testified as follows concerning the circulation of the petition:

"I saw [Jean Vandendriessche] walk around with it . . . I was aware of the petition being circulated on the floor for a couple of minutes—five minutes. I didn't want to get involved with it so I just walked away. I stayed clear of it."

11. Although as indicated above Ms. Brown is classified as a "Lead Person" and is included in the agreed upon bargaining unit, she is perceived by at least some of the employees as being their "supervisor". Evidence adduced by the applicant trade union establishes that when a sewing machine operator is hired, Plant Manager Robert Sharman provides the new employee with a form which specifies his or her position, rate of pay and starting date. This form also contains the following information: "Your supervisors [sic] name is *Elizabeth Brown*." The evidence further indicates that the following notice was posted on the plant bulletin board in August of 1980:

"Attention All Employees

Effective August 29, 1980, the plant will be going on our winter shift 8:00 am to 4:00 pm. Morning break will be from 10:00 am to 10:10 am. Afternoon break will be from 2:00 pm to 2:10 pm.

Yours Truly,

(signed) Elizabeth Brown
Plant Supervisor."

12. Although Ms. Brown does not hire or discharge employees, she does allocate work among the operators, sign work production reports (as "supervisor") concerning their productivity, and ask them if they want to work overtime. When an employee returns to work

following absence, she completes and signs the sheet which specifies the reason for the absence. Moreover, she meets with Mr. Sharman frequently and recommends from time to time that he call certain employees into his office to “talk to [them] because their production is low”. Ms. Brown also “attends with them when they go into the office”.

13. The evidence adduced before this Board does not establish that Ms. Brown “exercises managerial functions” within the meaning of section 1(3)(b) of the Act. However, in determining the voluntariness of a petition, the Board is concerned with what was reasonably perceived by the employees rather than with objective reality (see *Fibre Therm Corp.*, [1980] OLRB Rep. Aug. 1196 and *Dad’s Cookies*, [1976] OLRB Rep. Sept. 545). Having regard to all of the evidence and the submissions of the parties, the Board finds that employees would reasonably perceive Ms. Brown as being in greater proximity to managerial authority than other employees. Moreover, in view of the close communicative ties between Ms. Brown and Mr. Sharman, the Board concludes that the circulation of the petition on the respondent’s premises during working hours by Ms. Vandendriessche while Ms. Brown was present and able to observe at least part of the circulation, would cause an employee to reasonably suspect that the petition had the tacit support of management and to be concerned as to whether or not management might become aware of his or her decision to sign or not to sign it.

14. The burden of proving that, on the balance of probabilities, the petition represents a voluntary statement of desire on the part of the employees who signed it lies upon the objectors (see *Leamington Vegetable Growers Co-operative Limited*, [1974] OLRB Rep. June 402). Having regard to all the evidence before it, the Board finds that the objectors have not discharged that burden and that the petitions do not cast doubt upon the continued support of the members of the applicant for its certification.

15. In addition to the facts set forth above, there are also a number of other facts which support the Board’s conclusion that the voluntariness of the petitions has not been proved on the balance of probabilities.

16. The evidence establishes that during the second interview in the respondent’s hiring process, each employee is required to read a copy of the following document which is typed on the letterhead of the respondent:

“Our Company does not believe that union organization is necessary since we feel it desirable for an employee to deal directly with management without the interference of a third party attempting to represent or speak for them. It is now not necessary and will not ever be necessary for any of our employees to belong to a union in order to work at our plants.

Our Company has always tried to deal fairly with its employees in every way and provide everything that goes toward making up a good job for any of our people who sincerely and honestly deserve such an opportunity. We are convinced that our employees prefer to deal directly with our management rather than through a union. We are also convinced that our employees value their rights as free individuals to handle their own affairs and to speak for their own jobs without being dictated to and controlled by outside union leaders who in most instances know nothing about their jobs and are not really interested in them and their

job problems but only in part of their paychecks each week.

We are also convinced that wherever there are unions there is trouble, strife, and discord, and that a union would not work to our employees' benefit. In view of this, it is our Company's positive intention to oppose unionism by every proper means.

It is quite possible that from time to time our employees may be approached by a union representative attempting to convince them of the advantages of organization. We are aware that the union can make many false promises and claims, and distort facts on our business, profits, and many other areas that affect us, and we feel confident that our employees would rather get and will seek from supervision and management advice on any matters that concern them. Therefore, we urge that if employees are so approached by union representatives, they seek the advice, counsel, and necessary explanations from supervision on any questions that may arise relating to this subject.

It is also important for us to remember that any employees who may choose to join or belong to a union are not going to get any advantages or preferential treatment of any sort over those who do not join or belong to a union. Also, if anyone causes any of our employees troubles or difficulties at work, or puts any of our employees under any sort of pressure to join a union, it should be immediately reported to our Company's supervisors so that we can see that it is stopped. No employee will be allowed to solicit for the union, carry on activities or any other outside activities during his working time or with another employee during that employee's working time. Any employee who does so and thereby interferes with his own work or the work of other employees will be subject to immediate discharge."

Mr. Sharman testified that he provides each prospective employee with a copy of that document during the second interview but "most of the time" does not permit the employee to retain the document for the following reason:

"I'd take it back to keep it between the person and myself. I was afraid that it wasn't the right thing to do. I wanted to protect myself a bit."

17. It is unnecessary for the Board to decide in the present case whether the use of that document by Mr. Sharman on behalf of the respondent constituted an unfair labour practice. It is sufficient for the purposes of this case to note that through this document (which at least one employee was permitted to retain), each prospective employee was clearly and emphatically advised of the respondent's strong opposition to unionization. Furthermore, that document provides the backdrop against which all of the other evidence in the case must be viewed. Of particular importance are the two final sentences which provide further grounds upon which employees could reasonably conclude that the circulation of the petition by Ms. Vandendriessche in the plant during working hours had the tacit support of management, for if the circulation of the document was an "outside activity" which was not supported by management, Ms. Vandendriessche would have been risking "immediate discharge".

18. The evidence further establishes that Mr. Sharman met with the employees during their breaks from time to time to discuss matters relating to the plant. These informal meetings

occurred approximately three times per month. In August of 1980, he congratulated the employees for reaching the break-even point of \$26,000. However, it was his evidence that on September 2, 1980, Thomas Kerr, the person to whom he reports, advised him that the Comptroller had made an error concerning the break-even point, which was actually \$38,000. Mr. Sharman went to the cafeteria during a break on September 12 or 15, 1980, and informed the employees at what he described to be a “shocking meeting” that the break-even point was \$38,000. He also stated that he would be discharged and the plant might be closed unless the \$38,000 level was achieved in September. Ms. Vandendriessche testified that the September meeting differed significantly from previous meetings. During cross-examination she stated:

“This was the first time that it was serious. I don’t like to see anyone lose their job or a plant close down. Mr. Sharman had never said that at previous meetings. I took it very seriously. The other people in the plant were also affected . . .”

19. This Board is quite suspicious of the timing of the announcement of the possible closure of the plant in view of the fact that Mr. Sharman had received the “shocking” information concerning the new break-even point at least ten days prior to the meeting. However, even if Mr. Sharman did not intend to influence the employees’ freedom of choice with respect to joining the applicant in support of a certification application, it is probable that his statements at that meeting did in fact create an atmosphere in the plant in which at least some of the employees were concerned about their job security and signed a petition because they feared that they might lose their jobs if the applicant were certified. As stated in *Valley Bottling of Canada Ltd.*, [1978] OLRB Rep. Aug. 784, at paragraph 17:

“The Board has held in numerous decisions that a natural suspicion attaches to a statement of desire which follows on the heels of a union organizing campaign. The Board must assure itself that employees who have first indicated support for a trade union and then indicate a desire to withdraw that support have undergone this change of mind by their free choice; that is, free of overt or subtle influences issuing from the employer against the union. The Board, in assuring the rights of employees under the Act to select or reject a trade union as bargaining agent, recognizes the opportunity that employees’ dependence on the employer for their job security gives the employer to unduly influence their freedom of choice, *intentionally or unintentionally*.” [emphasis added.]

(See also *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813 and *Fibre Therm Corp.*, *supra*.)

20. A further very disturbing aspect of the instant case is the fact that Mr. Sharman called employees into his office in pairs prior to the circulation of the petition by Ms. Vandendriessche. During cross-examination concerning those meetings, he stated:

“This took place all one day. I think it was prior to the 12th [of September, 1980]. I know I did do it. I’m not certain when. It could have been after the 15th or prior to the 12th. It could have been either one of these two weeks . . . I asked Liz Brown to send in two people. As they left, I asked one of them to send in another two people by name. In a couple of

cases I specifically picked two different people. I wanted to have two different people who could communicate in two different ways. I tried to get a person who is more dominant and a person who is less dominant. I called them in in order to get an honest response. I wanted people to pair up. I called them in because someone had accused me of swearing at them. It could have happened but I did not remember swearing at them. I asked them: 'Have you ever heard me swear at anyone in the plant? Have I ever sworn at you in the plant? I wanted them to answer honestly because I wanted to know if I had done it and wasn't able to remember. . . I asked them if they thought I was fair with everyone. . . I first became aware that someone had said that I had sworn at them five or ten days earlier. It was on my mind. I discussed it with my wife. She suggested that I bring them in and ask them about it."

After a recess during the final day of hearing, Mr. Sharman stated in response to a leading question from Mr. Lee (who examined him on behalf of the objectors): "I was in Kingsville, Ontario, on the 18th [of September, 1980] so it had to be prior to that that I spoke to the employees [two at a time] in my office."

21. Ms. Rita Latulippe testified that about two days after the meeting in the cafeteria at which Mr. Sharman mentioned the possible closure of the plant, he "called pretty well everyone in to meet with him two at a time." She further testified:

"He asked what he had done personally to any of us - had he ever sworn at or done anything to offend us? If so, we could tell him openly. He went on to say that the plant may be closing but that he hoped that instead of closing that they would put another manager in to give the plant a chance."

Ms. Latulippe impressed the Board as being a candid and reliable witness and we accept her testimony as an accurate statement of the events in question, notwithstanding Mr. Sharman's denial that he mentioned the possibility of closure when he met with the employees two at a time in his office. We also accept her evidence that these meetings occurred after the aforementioned meeting in the cafeteria.

22. One of the employees who testified before the Board on behalf of the objectors stated that another employee attempted to persuade her to join the applicant trade union on the basis of "things that she [the other employee] had to say against Mr. Sharman". Although she could not remember exactly what was said, her evidence together with the aforementioned evidence concerning Mr. Sharman's meetings with employees in pairs would permit the Board to draw the inference that Mr. Sharman was advised that union organizers were telling employees that he had sworn at or otherwise treated employees unfairly. If no mention of unionization accompanied the information given to Mr. Sharman concerning his alleged mistreatment of employees, it is difficult to understand why he would have resorted to the extraordinary step of interfering with production during a period in which increased production was (according to his evidence) crucial to the continued existence of the operation, by calling employees into his office in pairs to ask them if he had ever sworn at them or treated them unfairly. Moreover, as discussed above, whatever Mr. Sharman's actual intent may have been, it is probable that the effect of his actions was to create an atmosphere in the plant in

which at least some employees signed a petition out of concern for their job security rather than out of a voluntary “change of heart” with respect to their continued support for certification of the applicant.

23. For all of the foregoing reasons, the Board repeats the finding set forth above that in the circumstances of this case, the objectors have not proved on the balance of probabilities that the petitions represent voluntary statements of desire on the part of the employees who signed them. Accordingly, the petitions do not cast doubt upon the continued support of the members of the applicant for its certification.

24. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 24, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. Counsel for the respondent contended that even if the Board was not satisfied as to the voluntariness of the petitions, it should nevertheless exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken, since, in his submission, all the employees had taken a position either in favour of or against the trade union. He further argued that in the circumstances of the instant case, management has the right to know that the certified bargaining agent has in fact the mandate of a majority of the employees.

26. Notwithstanding the able submissions of counsel for the respondent, the Board in the exercise of its discretion under section 7(2) of the Act declines to direct that a representation vote be taken. Having regard to all of the evidence and submissions of the parties, we are not satisfied that circumstances exist in the present case which would make it appropriate for the Board to depart from its general practice of certifying without a vote in the absence of circumstances which cast doubt upon the continued support of the members of the applicant trade union for its certification or which cast doubt upon the validity of the applicant's membership evidence. Moreover, in view of the atmosphere which has been created in the plant intentionally or unintentionally by Mr. Sharman, the Board is of the view that in any event, the true wishes of the employees with respect to certification of the applicant would not likely be revealed by a representation vote.

27. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER C. G. BOURNE:

1. I would agree with the majority of the Board that the objectors have not proved, on the balance of probabilities, that the petitions entered in evidence, represent voluntary statements on the part of those employees who signed them.

2. Nevertheless I am firmly of the opinion that the Board should exercise its discretion under section 7(2) of the Act, and order a representation vote. From the testimony of Finney Lee and the group for whom he acted as spokesman, there is no doubt in my mind that they and perhaps others, would declare their wishes in a perfectly free and voluntary manner. I would therefore order a vote, as they urged upon us most strongly.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1980

BARGAINING AGENTS CERTIFIED DURING OCTOBER

No Vote Conducted

1967-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. Duron Ottawa Ltd. (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener).

Unit: "all cement masons, cement masons' apprentices and construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (22 employees in the unit).

0016-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Leader Structures (Ontario) Limited (Respondent) v. The Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa-Hull (Intervener).

Unit: "all cement masons, cement masons' apprentices and construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (40 employees in the unit).

1773-79-R: Greater Northern Ontario Trucking Association (Applicant) v. R. E. Law Crushed Stone Limited (Respondent).

Unit: "all dependent contractors who are owner-operators of trucks engaged by the respondent and working in or out of Port Colborne, Ontario." (46 employees in the unit). (*Having regard to the agreement of the parties*).

1835-79-R: Hotel and Club Employees' Union, Local 299, Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.C.-C.L.C.) (Applicant) v. Sutton Place Hotel and Dennis Management Company, an operating division of Affiliated Realty Corporation Limited (Respondents).

Unit: "all employees of Dennis Management Company, an operating division of Affiliated Realty Corporation Limited, employed in the maintenance department of The Sutton Place complex in Metropolitan Toronto, save and except maintenance chief engineer, those above the rank of maintenance chief engineer, apartment superintendents, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and those covered by subsisting collective agreements." (38 employees in the unit). (*Having regard to the agreement of the parties*).

2105-79-R: Laurentian University Support Staff Association (Applicant) v. Laurentian University of Sudbury (Respondent).

Unit: "all employees of the respondent in clerical, technical, administrative and service work, save and except supervisors, persons above the rank of supervisor, secretaries (2) in the office of the President,

secretary to the Vice-President Academic, secretary to the Vice-President Administration, secretary to the Comptroller, secretary to the Chief of Security, personnel services staff, Office Supervisor Continuing Education, Office Supervisor Registrar's Office, Office Supervisor Treasury, Equipment Supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements or certificates of The Labour Relations Board." (54 employees in the unit).

2336-79-R: The Ontario Public Service Employees Union (Applicant) v. Stratford & District Association of the Mentally Retarded (Respondent).

Unit: "all employees of the respondent in Stratford, Ontario, save and except Business Administrator, Manager/Frederick Industries, Director of Residence, Manager/Eileen Langley Training Centre, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in the unit).

2474-79-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Glen Fox Construction Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0631-80-R: Toronto Typographical Union No. 91 (ITU) (Applicant) v. Multipak Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, persons employed not more than twenty-four hours per week and students employed during the school vacation period." (36 employees in the unit). (*Clarity note*). (*Having regard to the agreement of the parties*).

0780-80-R: Hotel, Restaurant & Cafeteria Employees Union Local 75, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.L.C.-C.I.O.) (Applicant) v. The Royal Canadian Yacht Club (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the Food and Beverage Service Department in the Municipality of Metropolitan Toronto, save and except Steward, Maitre d', Executive Chef, Food and Beverage Manager, persons above the rank of Food and Beverage Manager, and Office Staff." (53 employees in the unit). (*Having regard to the foregoing and to the agreement of the parties*).

0844-80-R: United Plant Guard Workers of America, Local 1962 (Applicant) v. General Motors of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all security guards employed by the respondent at its South Plant in the City of Oshawa, in the Regional Municipality of Durham, in the geographic limits of Bloor Street on the north, Philip Murray Avenue on the south, Park Road South on the east and Steveson Road on the west, save and except sergeants and persons above the rank of sergeant, office and clerical employees, students employed during the school vacation period, all persons regularly employed for not more than 24 hours per week and all other employees." (51 employees in the unit).

0848-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. E & E Seegmiller Limited (Respondent) v. Teamsters' Construction Council of Ontario (Intervener).

Unit: "all employees of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, in sectors other than the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman." (27 employees in the unit).

0967-80-R: Ontario Nurses' Association (Applicant) v. The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston (Respondent) v. Group of Employees (Objectors).

Unit #1: (See Applications Certified Subsequent to Pre-Hearing Vote).

Unit #2: "all lay registered and graduate nurses regularly employed in a nursing capacity for not more than 24 hours per week by the respondent in Kingston, Ontario, save and except head nurses, persons above the rank of head nurse, quality assurance officer and employee health nurse." (104 employees in the unit).

1054-80-R: United Food and Commercial Workers, International Union (Applicant) v. W. Frank Real Estate Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all clerical and office employees of the Respondent employed in the City of Oshawa save and except the head bookkeeper, persons above the rank of head bookkeeper, the confidential secretary to the President, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

1090-80-R: Teamsters Local Union 1166, Chemical Energy and Allied Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouse and Helpers of America (Applicant) v. Federal Packaging and Partition Company Limited (Respondent).

Unit: "all employees of the respondent at its Ajax, Ontario, plant, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (86 employees in the unit). (*Having regard to the agreement of the parties*).

1131-80-R: Office and Professional Employees International Union (Applicant) v. Sensenbrenner Hospital (Respondent) v. Group of Employees (Objectors).

Unit #1: "all office, clerical and technical employees of the respondent at Kapuskasing, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, secretary to administrator, secretary to the assistant administrator and director of nursing, payroll officer, department heads, chief technologists, and persons above the rank of department head and chief technologist, persons regularly employed for not more than 24 hours per week, students employed during school vacation period and persons covered by any subsisting collective agreements." (27 employees in the unit).

Unit #2: "all office, clerical and technical employees of the respondent at Kapuskasing, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, secretary to administrator, secretary to the assistant administrator and director of nursing payroll officer, department heads, chief technologists, persons above the rank of department head and chief technologist and persons covered by any subsisting collective agreement." (4 employees in the unit). (*Clarity note*). (*Having regard to the agreement before it*).

1152-80-R: United Steelworkers of America (Applicant) v. Hamilton Kent of Canada Limited (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1159-80-R: United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. 352018 Ontario Limited, carrying on business as Select Meat Packers "1977" (Respondent).

Unit: "all employees of the respondent at 1-3 Glen Scarlett Road, Toronto, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in the unit). (*Having regard to the agreement of the parties*).

1167-80-R: United Steelworkers of America (Applicant) v. S.B. & A. Foundry Limited carrying on business under the firm and style of Standard Brass and Aluminium Foundry (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Guelph, save and except foremen, persons above the rank of foreman, office and sales staff." (23 employees in the unit).

1168-80-R: United Steelworkers of America (Applicant) v. Seemetal Limited (Respondent).

Unit: "all employees of the respondent in Orillia, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (55 employees in the unit). (*Having regard to the agreement of the parties*).

1171-80-R: Ontario Nurses' Association (Applicant) v. Fairhaven Home for Senior Citizens (Respondent) v. Group of Employees (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Peterborough, save and except the Director of Nursing and persons above the rank of Director of Nursing." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1174-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 510 (Respondent).

Unit: "all employees of the respondent save and except supervisors, persons above the rank of supervisor and office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1175-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Village of Elora (Respondent).

Unit: "all employees of the Corporation of the Village of Elora working at the Elora District Community Centre, save and except non-working foremen, those above the rank of non-working foreman, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1176-80-R: International Union of operating Engineers, Local 793 (Applicant) v. The Corporation of the Village of Elora (Respondent).

Unit: "all employees of the Corporation of the Village of Elora in its Public Works Department, save and except non-working foreman, those above the rank of non-working foreman, office and clerical

staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

1191-80-R: United Steelworkers of America (Applicant) v. Para Paints Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all plant and warehouse employees of the respondent in Metropolitan Toronto save and except foremen and order desk supervisors, persons above the rank of foreman and order desk supervisor, office and sales staff, quality control and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (30 employees in the unit). (*Clarity note*). (*Having regard to the agreement of the parties*).

1223-80-R: International Brotherhood of Painters and Allied Trades — Local Union 1891 (Applicant) v. Parkdale Drywall & Construction Incorporated (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*Clarity note*).

1226-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. E & E Seegmiller Limited (Respondent).

Unit: “all employees of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (19 employees in the unit).

1232-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Winchester Conduits & Structures (Respondent).

Unit: “all employees of the respondent in the industrial and institutional sector of the construction industry in the Province of Ontario and all the employees of the respondent in all other sectors in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

1237-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Spadco Construction Co. Ltd. (Respondent).

Unit: “all employees of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

1243-80-R: Ottawa Typographical Union, Local 102 (Applicant) v. The Glengarry News Limited (Respondent).

Unit: "all employees of the respondent employed on the premises at 3 Main Street, Alexandria, Ontario, save and except president, publisher and general manager, and persons regularly employed for not more than 24 hours per week." (10 employees in the unit). (*Having regard to the agreement of the parties*).

1245-80-R: Office and Professional Employees International Union (Applicant) v. Energy and Chemical Workers Union (Respondent).

Unit: "all office and clerical employees of the respondent in Ontario, save and except national representatives, persons above the rank of national representative, the executive assistant to the national secretary-treasurer, the confidential secretary to the national secretary-treasurer and legal counsel." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1250-80-R: Christian Labour Association of Canada (Applicant) v. Fiddicks Nursing Home Limited (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at Petrolia, save and except head nurses and persons above the rank of head nurse." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1251-80-R: Christian Labour Association of Canada (Applicant) v. Fiddicks Nursing Home Limited (Respondent).

Unit: "all employees of the respondent at Petrolia, save and except registered and graduate nurses, activities director, head cook, housekeeping supervisor, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1263-80-R: Labourers' International Union of North America, Local 837 (Applicant) v. Archie MacDonald Drilling & Blasting (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1264-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Blue-Con Construction Inc. (Respondent).

Unit: "all employees of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1269-80-R: Teamsters Local Union 132, Chemical, Energy & Allied Workers Division, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Sinclair Valentine and Frye Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at 4590 Dufferin Street, Downsview, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, technical staff, management trainees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (79 employees in the unit). (*Having regard to the agreement of the parties*).

1270-80-R: Office and Professional Employees International Union (Applicant) v. Buntin Reid Paper Division of Domtar Inc. (Respondent) v. The Canadian Paperworkers Union (Intervener) v. Group of Employees (Objectors).

Unit: “all office, clerical and technical employees employed by the respondent in Metropolitan Toronto, save and except assistant managers, persons above the rank of assistant manager, salesmen, secretary to the president, students employed during the school vacation period, and persons covered by subsisting collective agreements between the respondent and Canadian Paperworkers Union, Local 1291.” (62 employees in the unit).

1274-80-R: International Union of Electrical, Radio and Machine Workers (Applicant) v. Electrohome Limited (Respondent).

Unit: “all employees of the respondent employer in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office, clerical, accounting and sales staff, and customer service representatives.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

1285-80-R: United Food and Commercial Workers International Union (Applicant) v. C.H.P. Developments Limited (Respondent).

Unit: “all registered and graduate nurses employed in that capacity by the respondent at Mapleton Manor Nursing Home at Listowel, Ontario, save and except the Director of Nurses and those above the rank of Director of Nurses.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1286-80-R: United Food and Commercial Workers International Union (Applicant) v. C.H.P. Developments Limited (Respondent).

Unit #1: “all employees of Mapleton Manor Nursing Home at Listowel, Ontario, save and except Registered and Graduate Nurses employed in that capacity, Director of Nurses, persons above the rank of Director of Nurses, Office and Clerical Staff, and those persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (19 employees in the unit).

Unit #2: “all employees of Mapleton Manor Nursing Home at Listowel, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except Registered and Graduate Nurses employed in that capacity, the Director of Nurses and persons above the rank of the Director of Nurses and Office and Clerical Staff.” (17 employees in the unit). (*Clarity note*). (*Having regard to the agreement of the parties*).

1314-80-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. C & L Szabo's Construction Inc. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

1317-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Fruehauf Canada Inc. (Respondent).

Unit: “all production and maintenance employees of the respondent in the City of Ingersoll, Ontario, save and except office and clerical employees, plant production employees, all supervisory employees carrying the rank of foreman, acting foreman or above, and any direct representative of the Company.” (25 employees in the unit). (*Having regard to the agreement of the parties*).

1324-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. TNT Parcel Express, A Division of Western Dispatch Inc. (Respondent).

Unit: "all employees of the respondent working at or out of London, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff." (9 employees in the unit).

1328-80-R: United Steelworkers of America (Applicant) v. Lyman Tube, Division of Jannock Tube Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Oakville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (19 employees in the unit). (*Clarity note*). (*Having regard to the agreement of the parties*).

1334-80-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Tamarron Group Incorporated (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit).

1346-80-R: Canadian Union of Public Employees (Applicant) v. Sunnycrest Nursing Homes Ltd. (Respondent).

Unit: "all employees of Sunnycrest Nursing Homes Ltd., in the Regional Municipality of Durham, save and except professional medical staff, registered nurses, graduate nurses, office and clerical staff, activities director, supervisors and persons above the rank of supervisor." (58 employees in the unit). (*Having further regard to the agreement of the parties*).

1349-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Peel Condominium Corporation No. 191 (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 50 Elm Drive East, Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff." (3 employees in the unit).

1350-80-R: United Food and Commercial Workers International Union, Local 725, AFL-CIO-CLC (Applicant) v. Pizza Pizza Limited (Respondent).

Unit: "all employees of the Respondent at its Customer Telephone Order Centre (Phone Room) in Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor." (29 employees in the unit). (*Clarity note*). (*Having regard to the agreement of the parties*).

1356-80-R: Labourers' International Union of North America — Local 183 (Applicant) v. Nu-Age Enterprises (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1357-80-R: Labourers' International Union of North America — Local 183 (Applicant) v. Plants Drilling & Blasting (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save

and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1358-80-R: Labourers’ International Union of North America — Local 183 (Applicant) v. Blue-Con Construction (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener).

Unit: “all construction Labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

1359-80-R: Labourers’ International Union of North America — Local 183 (Applicant) v. Elmford Construction Co. Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

1365-80-R: United Steelworkers of America (Applicant) v. Homeware Industries Limited (Respondent).

Unit: “all employees of the respondent in Beaverton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (25 employees in the unit). (*Having regard to the agreement of the parties*).

1371-80-R: Canadian Union of Public Employees (Applicant) v. Case Manor (Respondent).

Unit: “all employees of the respondent in the County of Victoria, save and except professional medical staff, graduate nurses, undergraduate nurses, activity director, office and clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (72 employees in the unit). (*Having regard to the agreement of the parties*).

1390-80-R: Bakery, Confectionery & Tobacco Workers’ International Union, Local 264 (Applicant) v. Bake-Rite Foods Inc. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, office staff and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (72 employees in the unit). (*Having regard to the agreement of the parties*).

1393-80-R: United Garment Workers of America (Applicant) v. Buckeye Peerless Textile Products Co. Ltd. (Respondent).

Unit: “all employees of the respondent at its operation at 641 13th Avenue North, Hanover, Ontario, save and except operational supervisors, foremen, foreladies, and persons above the rank of operational supervisor, foreman, forelady, office, clerical, maintenance, sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

1398-80-R: Canadian Union of Public Employees (Applicant) v. Ongwanada Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: “all employees of Ongwanada Hospital, Hopkins Division, at Kingston, Ontario regularly employed for not more than 24 hours per week, save and except department heads, persons above the

rank of department head, graduate nurses, undergraduate nurses, registered nurses, dietitians, office staff, radiologists, cardiologists, pharmacists, occupational therapists, physiotherapists, technicians, and persons covered by subsisting collective agreements between Ongwanada Hospital, Hopkins Division, and the Canadian Union of Public Employees, Local 29." (44 employees in the unit). (*Having regard to the agreement of the parties*).

1399-80-R: Canadian Union of Public Employees (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent working twenty-four (24) hours or less per week at Ongwanada Hospital, Kingston, Ontario, save and except head cook, dietitians, office staff, and those persons covered by a subsisting collective agreement with the Canadian Union of Public Employees and its Local 29." (10 employees in the unit). (*Having regard to the agreement of the parties*).

1400-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tricil Limited (Respondent).

Unit: "all employees of the respondent engaged in Tricil Limited's sanitary landfill operation in the Township of Glanbrook, save and except foremen, those above the rank of foreman, office and sales staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

1401-80-R: Christian Labour Association of Canada (Applicant) v. Broadway Manor Nursing Home (Respondent).

Unit: "all registered and graduate nurses employed by the respondent at Paris, Ontario, save and except director of nursing and persons above the rank of director of nursing." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1407-80-R: Canadian Union of Public Employees (Applicant) v. South Central Regional Library System (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth save and except supervisors and those above the rank of supervisor and the secretary to the director." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1409-80-R: Canadian Food and Associated Services Union (Applicant) v. Walfood Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at the Sun Life premises at 20 King Street West, in the City of Toronto, save and except supervisors, persons above the rank of supervisor, chefs who exercise managerial functions, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1410-80-R: Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of the Regional Municipality of York (Respondent).

Unit: "all office and clerical employees of the respondent employed in the Regional Municipality of York, save and except executive secretary, accounting clerical assistant, assistant accountant, controller and persons above such rank, and persons covered by subsisting collective agreements." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1450-80-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J. Stuart Bell Construction Co. Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1452-80-R: Christian Labour Association of Canada (Applicant) v. Black Top Enterprises Limited (Respondent).

Unit: “all construction labourers, truck drivers and all employees of the respondent in the Counties of Brant and Norfolk engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit). (*Having regard to the foregoing*).

1458-80-R: Construction Workers Local #6 affiliated with the Christian Labour Association of Canada (Applicant) v. Degroot’s Plumbing and Heating Limited (Respondent).

Unit: “all electricians, electricians’ apprentices, plumbers and plumbers’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*Having regard to the foregoing*).

1472-80-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Dominion Bridge Company, Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0203-78-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Ellis Don Limited (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener).

Unit: “all cement masons and cement masons’ apprentices and helpers engaged in cement finishing work on all concrete construction, save and except non-working foremen and those above the rank of non-working foreman in the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormount, Glengarry, Prescott, Russell, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa-Carleton.” (4 employees in the unit). (*Clarity note*).

Number of names of persons on revised voters’ list		4
Number of persons who cast ballots		4
Number of ballots marked in favour of the applicant	4	
Number of ballots marked in favour of the intervener	0	

0205-78-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Concrete Columb Clamps (1961) Limited (Respondent) v. Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener).

Unit: "all cement masons and cement masons' apprentices and helpers engaged in cement finishing work on all concrete construction, save and except non-working foremen and those above the rank of non-working foreman in the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormount, Glengarry, Prescott, Russell, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa-Carleton." (3 employees in the unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots		3
Number of ballots marked in favour of the applicant	2	
Number of ballots marked in favour of the intervener	1	

0206-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Olympia & York Developments Ltd. (Respondents) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener).

Unit: "all cement masons and cement masons' apprentices and helpers engaged in cement finishing work on all concrete construction, save and except non-working foremen and those above the rank of non-working foreman in the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormount, Glengarry, Prescott, Russell, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa-Carleton." (2 employees in the unit).

Number of names of persons on revised voters' list		2
Number of persons who cast ballots		2
Number of ballots marked in favour of the applicant	2	
Number of ballots marked in favour of the intervener	0	

0207-78-R: Labourers' International Union of North America, Local 527 (Applicant) v. Foundation Company of Canada Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener).

Unit: "all cement masons and cement masons' apprentices and helpers engaged in cement finishing work on all concrete construction, save and except non-working foremen and those above the rank of non-working foreman in the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormount, Glengarry, Prescott, Russell, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa-Carleton." (5 employees in the unit). (*Clarity note*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots		5
Number of ballots marked in favour of the applicant	5	
Number of ballots marked in favour of the intervener	0	

0222-80-R: Ontario Public Service Employees Union (Applicant) v. Scarborough Centenary Hospital Association (Respondent).

Unit: "all paramedical employees of the respondent employed in the Borough of Scarborough, Ontario, save and except supervising registered record librarian, co-ordinator of physical and occupational therapies, senior dietician, senior nuclear medicine technologist, senior occupational therapist, senior respiratory technologist, charge laboratory technologists, senior social services workers, division leaders in psychiatry, supervisors, persons above the rank of supervisor, students-in-training and persons covered by subsisting collective agreements." (99 employees in the unit).

Number of names of persons on revised voters' list		108
Number of persons who cast ballots	87	
Number of ballots marked in favour of applicant	45	
Number of ballots marked against applicant	37	
Ballots segregated and not counted	5	

0967-80-R: Ontario Nurses' Association (Applicant) v. The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston (Respondent) v. Group of Employees (Objectors).

Unit #1: "all lay registered and graduate nurses employed in a nursing capacity by the respondent in Kingston, Ontario, save and except head nurses, persons above the rank of head nurse, quality assurance officer, employee health nurse and persons regularly employed for not more than 24 hours per week." (101 employees in the unit).

Number of names of persons on revised voters' list		109
Number of persons who cast ballots	93	
Number of ballots marked in favour of applicant	50	
Number of ballots marked against applicant	42	
Ballots segregated and not counted	1	

Unit #2: (See Applications Certified — No Vote Conducted).

1140-80-R: Canadian Union of Public Employees (Applicant) v. St. Patrick's Home of Ottawa (Respondent).

Unit #1: "all lay employees of the respondent in the Regional Municipality of Ottawa Carleton, save and except professional medical staff, graduate nursing staff, undergraduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, technical personnel, director of recreation, co-ordinator of pastoral care, director of volunteers, director of outreach programs, director of social services, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (42 employees in the unit).

Number of names of persons on revised voters' list		51
Number of persons who cast ballots	48	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	25	
Number of ballots marked against the applicant	22	

Unit #2: "all lay employees of the respondent in the Regional Municipality of Ottawa Carleton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nurses, undergraduate nurses, supervisors and persons above the rank of supervisor, technical personnel, office and clerical staff, director of research, co-ordinator of pastoral care, director of volunteers, director of outreach programs, and director of social services." (24 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of person on list as originally prepared by employer		26
Number of persons who cast ballots	17	
Number of ballots marked in favour of the applicant	10	
Number of ballots marked against the applicant	7	

Applications Certified Subsequent to Post-Hearing Vote

0430-80-R: Canadian Union of Public Employees (Applicant) v. Guelph General Hospital (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all office and clerical employees of the respondent in the City of Guelph regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, persons covered by subsisting collective agreements, secretary to the executive director, secretary to the assistant executive director, secretary to the personnel director and the clergy co-ordinator." (35 employees in the unit).

Unit #2: "all employees of the respondent regularly employed for not more than 20 hours per week and students employed during the school vacation period in the City of Guelph, save and except professional medical staff, graduate nursing staff, undergraduate pharmacists, graduate nutritionists, student nutritionists, technical personnel, physiotherapists, occupational therapists, student physiotherapists, student occupational therapists, office and clerical staff, supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (35 employees in the unit). (*Clarity note*). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		93
Number of persons who cast ballots		43
Number of ballots marked in favour of applicant	29	
Number of ballots marked against applicant	10	
Ballots segregated and not counted	4	

0612-80-R: Amalgamated Clothing and Textile Workers Union – Toronto Joint Board (Applicant) v. Tiny Tots Knitting Mills Inc. (Respondent).

Unit #1: "all employees of the respondent in the City of Hamilton, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, designers, office and sales staff, homeworkers, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (68 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		69
Number of persons who cast ballots		51
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	27	
Number of Ballots marked against applicant	23	
Ballots segregated and not counted	8	

0799-80-R: Hotel, Restaurant and Cafeteria Employees' Union, Local 75 Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Toronto Airport Hilton, a division of Toronto Hilton Inc. (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales, accounting and front desk staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (116 employees in the unit).

Number of names of persons on revised voters' list		98
Number of persons who cast ballots		81
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	58	
Number of ballots marked against applicant	22	

0943-80-R: United Steel Workers of America (Applicant) v. Garco Machining Service Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Sudbury, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, professional engineers, draftsmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (25 employees in the unit). (*Clarity note*). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		27
Number of persons who cast ballots		29
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	10	
Ballots segregated and not counted	2	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0953-80-R: Ontario Taxi Association 1688, C.L.C. (Applicant) v. Blue Line Taxi Co. Limited et al. (Respondents). (56 employees in the unit).

0954-80-R: Ontario Taxi Association 1688, C.L.C. (Applicant) v. Blue Line Taxi Co. Limited et al. (Respondents). (578 employees in the unit).

0955-80-R: Ontario Taxi Association 1688, C.L.C. (Applicant) v. Blue Line Taxi Co. Limited et al. (Respondents). (15 employees in the unit).

0997-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Duracon Precast Industries Ltd. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener). (32 employees in the unit).

1110-80-R: The Labourers' International Union of North America, Local No. 506 (Applicant) v. Bonavista Pools Limited (Respondent). (13 employees in the unit).

1155-80-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Doulton Canada Inc. (Respondent) v. Group of Employees (Objectors). (44 employees in the unit).

Certification Dismissed Subsequent to Pre-Hearing Vote

0188-80-R: Labourers' International Union of North America, Local 625 (Applicant) v. Bravo Cement Contracting Ltd. (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 345, (Incumbent trade union).

Unit: “all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit). (*Clarity note*).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots	7	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of incumbent trade union	3	

1113-80-R: Christian Labour Association of Canada (Applicant) v. Central Stampings Limited (Respondent) v. International Union, United Automobile, Aerospace and Agricultural Implement of America, U.A.W. (Intervener).

Unit: "all employees of Central Stampings Limited at Windsor, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (110 employees in the unit).

Number of names of persons on revised voters' list		132
Number of persons who cast ballots	123	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	12	
Number of ballots marked in favour of intervener	108	

1173-80-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Standard Products (Canada) Limited (Respondent) v. The Canadian Rubber Workers Union #154 (Intervener).

Unit: "all employees of Standard Products (Canada) Limited in its Plant #1, 1030 Erie Street, and its Plant #2, 342 Erie Street, in the City of Startford, Ontario, save and except foremen, persons above the rank of foreman, timekeepers and time clerks, office and sales staff." (263 employees in the unit).

Number of names of persons on revised voters' list		277
Number of persons who cast ballots	250	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	91	
Number of ballots marked in favour of intervener	158	

1247-80-R: The Canadian Union of Public Employees (Applicant) v. J.A.V. Nursing Home - Beverly Hills Lodge (Respondent).

Unit: "all employees of the respondent, in Brantford, save and except professional medical staff, graduate nurses, undergraduate nurses, office staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (26 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots	32	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	18	

Certification Dismissed Subsequent to Post-Hearing Vote

1713-79-R: Laundry, Dry Cleaning and Dye House Workers International Union, Local 351 (Applicant) v. Four Seasons Hotels Limited (Respondent).

Unit: "all employees of the respondent at the Four Seasons Hotel in Belleville, Ontario, save and except assistant department heads and those above the rank of assistant department head, office and sales staff, front desk staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period and Banquet staff." (89 employees in the unit). (*Having regard to the agreement) of the parties*).

Number of names of persons on list as originally prepared by employer		79
Number of persons who cast ballots	71	
Number of ballots marked in favour of the applicant	27	
Number of ballots marked against the applicant	34	
Number of ballots agreed ineligible	2	
Number of ballots to be investigated	8	

2037-79-R: Canadian Union of United Brewery, Flour, Cereal Soft Drink and Distillery Workers, Local Union 304 (Applicant) v. Fortier Beverages Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Kirkland Lake, Ontario, save and except supervisors, persons above the rank of supervisor, sales manager, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (4 employees in the unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	3	

2111-79-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Gateway Delivery System of North Bay Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at or out of North Bay, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, and persons employed for not more than 24 hours per week." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	6	

APPLICATION FOR CERTIFICATION WITHDRAWN

2442-79-R: The United Brotherhood of Industrial, Construction, Maintenance and Service Workers of Ontario (Applicant) v. B.E.S.T. Mechanical of Elliot Lake Limited (Respondent).

0138-80-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Seaforth Building Group o/b 330012 Ontario Ltd. (Respondent).

0833-80-R: United Brotherhood of Carpenters & Joiners, Local 494 (Applicant) v. J. Watt & Co. (Builders) Ltd., Place Park Windsor Ltd., Royal Windsor Terrace, Montreal Trust Company (Respondents).

1049-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Gendrain Construction Limited (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener).

1233-80-R: Canadian Union of Public Employees (Applicant) v. Beaver Foods Limited Nutricare Division (Respondent) v. Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261, Ottawa (Intervener).

1282-80-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Samson Construction (1972) Limited (Respondent).

1322-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bennett Paving & Materials Limited (Respondent).

1325-80-R: United Cement, Lime and Gypsum Workers, Local 366 (Applicant) v. Willroy Mines Limited (Milton Limestone Aggregates Division) (Respondent).

1337-80-R: Canadian Paperworkers Union (Applicant) v. Somerville Belkin Industries Limited Packaging Division (Respondent) v. Printing Specialties & Paper Products Union, Local 466 (Intervener).

1351-80-R; 1352-80-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Chateau Gardens (Hanover) Inc. (Respondent).

1361-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Turnco Manufacturing (Respondent).

1370-80-R: Canadian Union of Public Employees v. Oshawa General Hospital (Respondent).

1378-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bot Construction Ltd. (Respondent).

1379-80-R: Local 233F, Retail Clerks International Union, C.L.C., A.F.L.-C.I.O. (Applicant) v. All Type Heat Treat Company Ltd. (Respondent).

APPLICATIONS UNDER SECTION 1(4)

1165-80-R: Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Boston Excavating & Grading Company Limited; Highvalley Landscaping & Contrators Limited; Fapp-Co Contractors Ltd. (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2476-79-R: Kathy Craig (Applicant) v. Hotel & Restaurant Employees Union, Local 756 (Respondent) v. City Hotel (Intervener). (*Granted*).

0279-80-R: Susan Bertrand and Daphne Barrow (Applicants) v. Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261 (Respondent). (*Granted*).

0329-80-R: Patrick R. Burge (Applicant) v. Union of Canadian Retail Employees, Local 1000A chartered by the United Food and Commercial Workers International Union (Respondent) v. More Groceteria Limited (Intervener). (*Granted*).

0774-80-R: James Wellwood (Applicant) v. Local 604-Hotel and Restaurant Employees and Bartenders Union, A.F. of L., C.I.O., C.L.C. (Respondent) v. Rock Haven Motels (Peterborough) Limited (Intervener). (*Granted*).

0789-80-R: Walter Brown (Applicant) v. United Steelworkers of America (Respondent) v. DoAll Canada Ltd. (Intervener). (*Granted*).

0952-80-R: Nat Salvatore and John Gerlofsma (Applicants) v. United Steelworkers of America (Respondent) v. Canadian Gypsum Company Limited (Intervener) (*Dismissed*).

0983-80-R: Doreen Patrick and Ron Lariviers (Applicants) v. Ontario Taxi Association 1688 C.L.C. (Respondents) v. Windsor Airline Limousine Services Limited, carrying on business as Veteran Cab Company (Intervener). (*Granted*).

0995-80-R: Clarence Hynes (Applicant), International Association of Machinists and Aerospace Workers and its Local 788 (Respondent) v. Winchester Canada (A Division of Olin Holdings Ltd.) (Intervener). (*Granted*).

1070-80-R: Dominic Pucano and Tony Amoral (Applicant) v. United Steelworkers of America (Respondent) v. Vulcan Welding Supplies, a division of Liquid Carbonic Ltd. (Intervener). (*Granted*).

1297-80-R: Kenneth L. Althouse (Applicant) v. Amalgamated Clothing and Textile Workers Union AFL-CIO-CLC (Respondent), v. Solaray, Division of Sunbeam Corporation (Canada) Limited (Intervener). (*Dismissed*).

1344-80-R: Charles A. Crerar on behalf of a Group of Employees (Applicant) v. United Steelworkers of America (Respondent) v. Hendrickson Manufacturing (Canada) Ltd. (Intervener). (*Dismissed*).

1387-80-R: Bill Tough (Applicant) v. United Brotherhood of America, Cross Tube Products Inc. (Respondents). (*Dismissed*).

APPLICATION UNDER SECTION 54

1272-80-R: Teamsters Local Union No. 1166 Chemical, Energy and Allied Workers, chartered by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Du Pont Canada Inc. (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1222-80-U: Spiers Brothers Limited (Applicant) v. International Union of Operating Engineers, Local 793 and Mike Quinn (Respondent). (*Withdrawn*).

1439-80-U: Neate Construction Limited (Applicant) v. Sheet Metal Workers' International Association, Local 537; International Brotherhood of Electrical Workers', Local 105; Labourers' International Union, Local 1081; Royce Arnold, Stan Quin, Laverne Schertzberg, Dan Bellhouse, Dan Boone, John Carvalho, Antonio Francisco, Don Franklin, Des Fullerton, Norman Fulsum, Doug Jarvis, Desmond Magee, Roger Mulligan, Freeman Noseworthy, William Parks, Richard Shaw, Larry Smith and Frank Verhulst (Respondents). (*Granted*).

APPLICATION FOR CONSENT TO PROSECUTE

0857-80-U: Ontario Public Service Employees Union (Applicant) v. John T. Koski, Brian A. Knight, R. C. Hurly and Cambrian College of Applied Arts and Technology (Respondents). (*Dismissed*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1668-79-U: Ontario Nurses' Association (Applicant) v. Maitland Manor Limited (Respondent). (*Withdrawn*).

1790-79-U: United Steelworkers of America (Complainant) v. Fotomat Canada Limited (Respondent). (*Granted*).

2193-79-U: Reginald Walder (Complainant) v. Local No. 1, Canadian Union of Public Employees (Respondent) v. Toronto Hydro Electric System (Intervener). (*Granted*).

2396-79-U: Toronto Motion Picture Projectionists Union, Local No. 173 of the International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Complainant) v. Darshan S. Sahota, carrying on business under the names and styles of Donlands Theatre, Lansdowne Theatre and Paradise Theatre (Respondent). (*Terminated*).

2397-79-U: Toronto Motion Picture Projectionists Union, Local No. 173 of the International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Complainant) v. Darshan S. Sahota, carrying on business under the names and styles of Donlands Theatre, Lansdowne Theatre and Paradise Theatre (Respondent). (*Terminated*).

0054-80-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Corporation of the City of Sarnia, Marshall Gowland Manor (Respondent). (*Withdrawn*).

0392-80-U: Peter Tsitiridis (Complainant) v. The Canadian Union of Public Employees and its Local 576 (Respondent) v. Board of Trustees of the Ottawa Civic Hospital (Intervener). (*Dismissed*).

0596-80-U: Labourers' International Union of North America, Local 183 (Complainant) v. Burlington Carpet Mills Canada Ltd., Leonard Roberts and Jim Garrot (Respondents). (*Dismissed*).

0625-80-U: United Steelworkers of America (Complainant) v. Knud Simonsen Industries Limited (Respondent). (*Dismissed*).

0723-80-U: Amalgamated Clothing and Textile Workers Union (Complainant) v. Tuxedo Junction Limited (Respondent). (*Granted*).

0766-80-U: Joseph Lapps, Michael Lewis, Stephen Brown, Basil Thomas and Peter Rampoutar (Complainants) v. United Steel Workers' Union of America (Respondent). (*Withdrawn*).

0842-80-U: Daniel Parmentier (Complainant) v. The Operative Plasterers' and Cement Masons' Association of the United States and Canada "Restoration Steeplejacks" Local 172 (Respondent). (*Withdrawn*).

0868-80-U: The Master Insulators' Association of Ontario Inc. (Complainant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent) v. Catalytic Enterprises Limited (Intervener #1) v. Consolidated Maintenance Services Limited (Intervener #2) v. General Presidents' Committee for Plant Maintenance in Canada (Intervener #3). (*Dismissed*).

0877-80-U: Samuel Williams (Complainant) v. United Steelworkers of America (Respondent). (*Dismissed*).

0924-80-U: The Ontario Public Employees Union (Complainant) v. Glengarda Residential and Day School for Exceptional Children (Respondent). (*Withdrawn*).

0935-80-U: Hotel, Motel & Restaurant Employees' Union Local 442 (Complainant) v. K.V.B. C.O.B. A La Crepe Bretonne Restaurant and Vince Catone (Respondents). (*Withdrawn*).

0937-80-U: Hotel, Restaurant Employees & Bartenders Union, Local 604, A.F.L., C.I.O., C.L.C. (Complainant) v. Rock Haven Motels (Peterborough) Limited (Respondent). (*Withdrawn*).

0939-80-U: Local 1979 Retail Clerks International Union Affiliated with the Canadian Labour Congress, AFL-CIO (Applicant) v. Wilson Automotive (Belleville) Limited (Respondent). (*Granted*).

0961-80-U: John N. McMahon (Complainant) v. All-Ways Transportation Services Limited (Respondent). (*Dismissed*).

1060-80-U: Labourers' International Union of North America, Local 183, (Complainant) v. Kerview Realty Services Limited and Grove Park Investments Limited and Keith Windross (Respondents). (*Withdrawn*).

1086-80-U: Donna Waslyk (Complainant) v. Teamsters Union L. 647 (Respondent). (*Withdrawn*).

1091-80-U: Gary S. Dosanjh (Complainant) v. U.A.W. Local 124 Plant Committee (Respondent) v. Titan Proform Co. Ltd. (Intervener). (*Dismissed*).

1123-80-U: Edward Joseph Devereaux (Complainant) v. CUPE Local 79 (Respondent). (*Withdrawn*).

1133-80-U: Canadian Union of Operating Engineers & General Workers (Complainant) v. Poirier Bus Line (Respondent). (*Withdrawn*).

1134-80-U: Service Employees Union, Local 183 (Complainant) v. Village Green Nursing Home Corporation (Respondent). (*Withdrawn*).

1136-80-U: Canadian Textile and Chemical Union (Complainant) v. Solaray, Division of Sunbeam Corporation (Canada) Limited (Respondent). (*Withdrawn*).

1148-80-U: Labourers' International Union of North America, Local 193 (Complainant) v. Goldlist Property Management (Respondent). (*Withdrawn*).

1157-80-U: Canadian Union of Public Employees (Complainant) v. Metropolitan Toronto and Region Conservation Authority (Respondent). (*Withdrawn*).

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1193-80-U: Ann Ormiston (Complainant) v. Retail, Wholesale and Department Store Union, Local 414 (Respondent). (*Withdrawn*).

1225-80-U: Ontario Public Service Employees Union (Complainant) v. Glengarda Residential and Day School for Exceptional Children (Respondent). (*Withdrawn*).

1242-80-U: Helen Barton, Rose Moloney and Betty Gracie (Complainants) v. Jolly Jumper Inc. (Respondent). (*Withdrawn*).

1261-80-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Complainant) v. Wiscot Mfg. Ltd. (Respondent). (*Withdrawn*).

1279-80-U: Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261 (Complainant) v. Holiday Inn of Ottawa-Centre, of the Commonwealth Holiday Inns of Canada (Respondent). (*Withdrawn*).

1315-80-U: Mr. Angelo Pirone (Complainant) v. Canadian Brotherhood of Railway, Transport and General Workers (Respondent). (*Withdrawn*).

1316-80-U: Canadian Union of Public Employees and its Local 65 (Complainant) v. Corporation of the Town of Fort Frances (Respondent). (*Withdrawn*).

1318-80-U: Crouse-Hinds Canada Limited (Applicant) v. United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 124, R. Scott, P. Ketko, B. Bart, P. Connolly et al. (Respondents). (*Withdrawn*).

1327-80-U: Toronto Typographical Union, No. 91 (I.T.U.) (Complainant) v. Multipak Limited (Respondent). (*Withdrawn*).

1347-80-U: Canadian Union of Public Employees (Complainant) v. Sunnycrest Nursing Home Limited (Respondent). (*Withdrawn*).

1348-80-U: United Food and Commercial Workers International Union (Complainant) v. Maple Lodge Farms Ltd. (Respondent). (*Withdrawn*).

1374-80-U: Canadian Union of Public Employees (Complainant) v. Beverly Hills Lodge (Respondent). (*Withdrawn*).

1375-80-U: Ontario Public Service Employees Union (Complainant) v. The District of Halton & Mississauga Ambulance Service Ltd., and Mr. R. J. Armstrong, Regional Co-ordinator, Ministry of Health (Respondents). (*Withdrawn*).

1377-80-U: Allan Bullock (Complainant) v. Mr. Dowling and Mr. Ted Simmons (Respondents). (*Withdrawn*).

1383-80-U: Canadian Labour Congress Local Union 1689 (Canadian Association of Burlesque Entertainers) (Complainant) v. Algonquin Tavern Limited, Wm. Duddy Enterprises (Respondents). (*Withdrawn*).

1389-80-U: Edward James Hector (Complainant) v. Ontario Sports Administration Centre Inc. (Respondent). (*Withdrawn*).

1404-80-U: Helen Cordina (Complainant) v. International Brotherhood of Pottery & Applied Workers Local 366 (Respondent). (*Withdrawn*).

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1457-80-U: Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Complainant) v. Bake-Rite Foods Inc. (Respondent). (*Terminated*).

1482-80-U: The Canadian Union of Public Employees (Complainant) v. Beverly Hills Lodge (Respondent). (*Withdrawn*).

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1495-80-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa (Complainant) v. Ravi Narula, Personnel Manager, & Harry Dugal, General Manager, Skyline York-Hannover, Ottawa, Ontario (Respondents). (*Withdrawn*).

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1320-80-OH: Len Belford (Complainant) v. Corporation of the City of Ottawa (Respondent). (*Withdrawn*).

1471-80-OH: United Steelworkers of America, Local 4694 on behalf of Mr. Mike Larkin (Complainant) v. Algoma Contractors Limited (Respondent). (*Withdrawn*).

1478-80-OH: Leslie J. Hegedus (Complainant) v. Howard & McClean Electrical Contractors Inc. (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39 (RELIGIOUS EXEMPTIONS)

0905-80-M: Robert S. Zwicker (Applicant) v. Energy & Chemical Workers Union – Local 593 (Respondent Trade Union) v. PCL Packaging Ltd. (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1254-80-M: The Continental Group of Canada Ltd. (Employer Applicant) v. United Steelworkers of America (Trade Union Applicant) v. Employee (Objector). (*Granted*).

1255-80-M: The Continental Group of Canada Ltd. (Employer Applicant) v. United Steelworkers of America (Trade Union Applicant) v. Employee (Objector). (*Granted*).

1256-80-M: The Continental Group of Canada Ltd. (Employer Applicant) v. United Steelworkers of America (Trade Union Applicant) v. Employee (Objector). (*Granted*).

APPLICATIONS UNDER SECTION 55

0356-80-R: Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Limited (Respondent) v. The Borden Company, Limited (Intervener #1) v. Canadian Union of Operating Engineers and General Workers, Local 101 (Intervener #2). (*Granted*).

0674-80-R: Milk & Bread, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Silverwood, Division of Silverwood Industries Limited (Respondent) v. The Borden Company, Limited (Intervener #1) v. Canadian Union of Operating Engineers and General Workers, Local 101 (Intervener #2). (*Granted*).

1164-80-R: Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Boston Excavating & Grading Company Limited; Highvalley Landscaping & Contractors Limited; Fapp-Co Contractors Ltd. (Respondents). (*Granted*).

1257-80-R: International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicants) v. Murard Masonry Contractors Ltd. and Charles Minty, carrying on business under the firm name and style of Charles Minty Masonry (Respondents). (*Granted*).

APPLICATION UNDER SECTION 73(2)

T-118-79: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Local Union 38, St. Catharines, Ontario (Respondent) v. Group of Employees (*Granted*).

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0435-80-JD: Bedard Girard Ontario, Division of BG Checo International Limited (Complainant) v. International Association of Bridge Structural and Ornamental Iron Workers, Local 786 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Respondents). (*Dismissed*).

0489-80-JD: United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the U.S.A. & Canada, Local 800 (Complainant) v. The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 786 (Respondent). (*Dismissed*).

0726-80-JD: Newlands Textiles Inc. (Complainant) v. Amalgamated Clothing and Textile Workers Union (Respondent). (*Withdrawn*).

1114-80-JD: International Union of Electrical, Radio and Machine Workers and International Union of Electrical Radio and Machine Workers, Local 599 (Complainant) v. Canadian General Electric Company Limited and United Electrical, Radio and Machine Workers of America, and its Local 524 (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

2049-79-M: Group of Employees (Applicant) v. Central Park Lodges of Canada and Services Employees Union, Local 210 (Respondents). (*Dismissed*).

2141-79-M: Metropolitan Toronto Zoological Society (Employer) v. Canadian Union of Public Employees, Local 1600 (Trade Union). (*Granted*).

2191-79-M: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Applicant) v. Delta's Inn of the Provinces (Respondents). (*Granted*).

0911-80-M: International Association of Machinists and Aerospace Workers (Applicant) v. Dowty Equipment of Canada Limited (Respondent). (*Terminated*).

1047-80-M: Local 494 United Cement Lime & Gypsum Workers International Union (Applicant) v. Nelson Crushed Stone, Division of Flintkote Canada Ltd. (Respondent). (*Dismissed*).

1498-80-M: The Canadian Union of Public Employees and its Local 1882 (Trade Union) v. The Corporation of the City of Cambridge (Employer). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112(a)

0534-79-M: The Toronto Building and Construction Trades Council and International Union of Napev Construction Limited (Respondent) v. Masonry Contractors' Association of Toronto (Intervener #1) v. Venice Masonry Contractors (Toronto) Limited & Co. (Intervener #2) v. Bricklayers, Masons Independent Union of Canada, Local 1 (Intervener #3). (*Granted*).

1030-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Kadoke Display (Respondent). (*Withdrawn*).

2362-79-M: The United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Tesc Contracting Limited; T. Lachance Construction Limited; B.E.S.T. Mechanical of Elliot Lake Limited (Respondent). (*Granted*).

0475-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union No. 38 (Applicant) v. Newman Bros. Co. Ltd. (Respondent). (*Dismissed*).

0653-80-M: International Union of Operating Engineers, Local 793 (Applicant) v. Thos. W. King Ltd. (Respondent). (*Withdrawn*).

1038-80-M: Sheet Metal Workers' International Association Local Union #285 (Applicant) v. Residential Sheet Metal Contractors Organization, Rexdale Heating Ltd. (Respondents). (*Withdrawn*).

1053-80-M: United Brotherhood of Carpenters & Joiners of America Local #494 (Applicant) v. Loaring Construction Co. Ltd. (Respondent). (*Withdrawn*).

1098-80-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Frank Vespi Paving, A Division of Frank Vespi Construction Ltd. (Respondent). (*Granted*).

1143-80-M: International Union of Operating Engineers, Local 793 (Applicant) v. Aurald Enterprises Limited and/or M. & M. Excavating, and M. & M. Excavating Limited (Respondents). (*Withdrawn*).

1144-80-M: International Union of Operating Engineers, Local 793 (Applicant) v. Aurald Enterprises Limited and M. & M. Excavating (Respondents). (*Withdrawn*).

1259-80-M: Carpenter Union 249 Kingston Ontario (Applicant) v. R. L. Wilson Engineering & Construction Limited (Respondent). (*Withdrawn*).

1260-80-M: Labourer's International Union of North America, Local 1059 (Applicant) v. Riverside Construction Company Limited (Respondent). (*Withdrawn*).

1288-80-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Williams Contracting Ltd. (Respondents). (*Withdrawn*).

1292-80-M: Labourers' International Union of America, Local 1059 (Applicant) v. Bird Construction Company Limited (Respondent). (*Withdrawn*).

1312-80-M: Local Union 1669 and the Ontario Provincial Council of Carpenters (Applicants) v. Deep Diving Systems Ltd. (Respondent). (*Withdrawn*).

1323-80-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Towland (London) 1970 Limited (Respondent). (*Withdrawn*).

1331-80-M: Labourers' International Union of North America, Local 1059 (Applicant) v. G. M. Gest (1977) Inc. (Respondent). (*Withdrawn*).

1332-80-M: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Consolidated Plant Maintenance Company (Respondent). (*Withdrawn*).

1341-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Domas Plumbing & Heating, a Division of Mississauga Construction Co. Ltd. (Respondent). (*Granted*).

1342-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. L. Pupolin Plumbing & Heating Co. Ltd. and the Metropolitan Plumbing and Heating Contractors, a Division of the Mechanical Contractors Association Toronto (Respondents). (*Granted*).

1355-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Dencon Engineering (Respondent). (*Granted*).

1367-80-M: Form Work Council of Ontario (Applicant) v. Ontario Form Work Association and Rili Brothers Forming Ltd. (Respondents). (*Withdrawn*).

1373-80-M: International Brotherhood of Painters and Allied Trades, Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local 1819 — Glaziers and Glassworkers (Applicants) v. Architectural Glass and Metal Contractors' Association and Jacks Glass & Mirror Service (Respondents). (*Granted*).

1385-80-M: The Sheet Metal Workers International Association Local 47 (Applicant) v. Eastern Sheet Metal and Mechanical Contractors (Respondent). (*Granted*).

1386-80-M: International Brotherhood of Painters and Allied Trades and the Ontario Council of Painters and Allied Trades and Local 1590 Sarnia Ontario (Applicant) v. Vella Painting & Decorating Co. Limited (Respondent). (*Withdrawn*).

1405-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Toronto and Builders' Association and Prospect Paving Limited and Kipling Paving Limited (Respondents). (*Withdrawn*).

1406-80-M: United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. Elrose Construction Co. (Respondent). (*Withdrawn*).

1431-80-M: International Union of Operating Engineers, Local 793 (Applicant) v. Prospect Paving Limited (Respondent). (*Withdrawn*).

1432-80-M: International Union of Operating Engineers, Local 793 (Applicant) v. Ciro Excavating and Grading Ltd. (Respondent). (*Granted*).

1438-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. General Carpentry Construction Co. (Respondent). (*Granted*).

1444-80-M: A Council of Trade Unions, Acting as the Representative and Agent of Teamsters' Local Union 230 and Labourers' Local 183 (Applicant) v. Ontario Paving Limited (Respondent). (*Withdrawn*).

1464-80-M: Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Welldun Mechanical Co. (Ottawa) Inc. (Respondent). (*Granted*).

1465-80-M: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and Local Union 71 of the Council (Applicant) v. Welldun Mechanical Co. (Ottawa) Inc. (Respondent) v. Mechanical Contractors Association of Ontario (Intervener #1) v. Mechanical Contractors Association of Ottawa (Intervener #2). (*Granted*).

1493-80-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Stebbins Paving & Construction Ltd. (Respondent). (*Withdrawn*).

1511-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Turzillo Contracting Limited (Respondent). (*Withdrawn*).

1521-80-M: Labourers' International Union of North America Local 183 (Applicant) v. The Utility Contractors' Association of Ontario & G. M. Gest (Respondents). (*Withdrawn*).

1532-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. John Ritchie Mechanical Contractors Ltd. (Respondent). (*Withdrawn*).

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0292-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sinclair Welding Limited (Respondent) v. Group of Employees (Objectors). (*Denied*).

0680-80-M: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Lapico Construction Ltd. (Respondent). (*Denied*).



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 OLRB Rep. Oct. 1519)

RICHMOND INSULATION COMPANY; RE C.L.A.C.; ASBESTOS WORK-
 ERS, LOCAL 95

1810

2003-79-R Ontario Public Service Employees Union, Applicant, v. Board of Education for the Borough of Scarborough, Respondent, v. Canadian Union of Public Employees, Intervener #1, v. Glen Purcell, Intervener #2, v. Scarborough Educational Staff Association, Intervener #3.

Bargaining Unit – Whether Board including permanent part-time and casual or temporary employees in full-time unit – Board practice reviewed – Whether secretary to school principal employed in confidential capacity

BEFORE: George W. Adams, Chairman and Board Members J. D. Bell and D. B. Archer.

APPEARANCES: *Barbara Linds and Norma Scarborough for the applicant; Norman MacL. Rogers, Q.C., Rod Mason and Robert Mitchell for the respondent; no one appearing for the interveners.*

DECISION OF THE BOARD; December 11, 1980

1. This is an application for certification.
2. The applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* R.S.O. 1970, c.232 as amended.
3. By decision dated February 27, 1980, the Board directed the taking of a prehearing representation vote as requested by the applicant for the following voting constituency of the respondent's employees for which the Board was satisfied that not less than 35% of the employees were members of the applicant at the time the application was made:

All office, clerical, technical employees, teacher aides and cafeteria aides of the Board of Education for the Borough of Scarborough employed in the Borough of Scarborough, save and except supervisors, persons above the rank of supervisors, persons regularly employed for not more than twenty-four (24) hours per week, students, and those employed in positions set out in Appendix "A".

4. Appendix "A" provided:

(a) Secretaries to the following:

Assistant Director of Education, Superintendent of Planning & Operations, Superintendent of Student & Community Services, Superintendent of Program, Superintendent of Plant, Comptroller of Finance, Assistant Superintendent of Planning & Operations, Assistant Superintendent of Student & Community Services, Assistant Superintendent of Program Financial Advisor, Chief Engineer, Purchasing Agent, Manager - Data Processing, Area Superintendents;

- (b) All persons employed in the office of the Director of Education;
- (c) All persons employed in the Communications office;
- (d) All persons employed in the Personnel Department;
- (e) All persons employed in the following positions:

Assistant Operating Engineer, Clerk "A" maintenance, Itinerant Music Teacher, Librarian, Security Officer, Senior Systems Analyst, Speech Pathologist, Systems Analyst, Physiotherapist, Psychometrist, Teaching Assistant (Waterloo Co-op), Water Safety Assistant;

- (f) All persons covered by subsisting collective agreements between the Board of Education for the Borough of Scarborough and:

(i) Canadian Union of Public Employees Local 149; (ii) Canadian Union of Public Employees, and its local 149; and (iii) The Association of Professional Student Services Personnel, Scarborough Chapter.

On the agreement of the parties it is understood that students means a bona fide student who: (i) is taking a minimum of 151 minutes per day instruction in a school; (ii) is engaged in a co-operative education work experience program which is part of the student credit program; (iii) is taking his/her education, in a school on a semestered program; and (iv) is employed during his/her vacation period.

5. In light of objections taken to the appropriateness of the proposed bargaining unit, the Board directed the segregation of the ballots cast by the following persons:

- (a) Attendance counsellors and community liaison officers employed in the attendance department;

- (b) All persons listed in Schedule "A" and "D" as employed on a casual and temporary basis;

- (c) All secretaries to secondary school principals.

6. At or about the same time the Board directed a labour relations officer to enquire into the duties and responsibilities of all persons whose bargaining unit status was in dispute other than persons regularly employed for not more than twenty-four (24) hours per week and those employees referred to in sub-paragraph (b) of paragraph 5 of this decision. With respect to these latter two groups of employees, the Board heard the evidence and representations of the parties directly at its hearing held on February 26, 1980.

7. In her report dated June 18, 1980, Ms. B. Mclean, labour relations officer, records that the applicant, respondent and Intervener #2 have agreed that the Attendance Counsellors and Community Liaison Officers of the Student Services Department (consisting of Glenn Purcell, Elaine Dunn, Steve Bedley, Shirley Mitchell, Sheila Irving, Laura Quan, Barbara Ross and Shiam Tripathi) are not appropriate for inclusion in the bargaining unit. The parties

have therefore agreed to the exclusion of these persons leaving for the Board's determination: (a) the appropriateness of excluding or including persons regularly employed for not more than twenty-four (24) hours per week and persons employed on a casual and temporary basis; and (b) whether the duties and responsibilities of some twenty-five persons classified as "Secretary to Principal-Secondary School" should be excluded from the proposed bargaining unit by operation of section 1(3)(b) of *The Labour Relations Act*.

8. *Permanent Part-time vs. Casual or Temporary*

Robert Allan Mitchell, personnel officer for the respondent, testified with respect to the respondent's position that permanent part-time employees ought to be included in the bargaining unit and that all casual or temporary (but full-time) employees ought to be excluded. The respondent employs permanent but part-time teacher aides; secretary/typists; cafeteria aides and clerical employees. Schedule B contains one hundred and thirty-four names bearing such designations. It is the respondent's evidence that the only distinction between permanent full-time and permanent part-time work is the number of hours worked by each group of employees. Part-time employees work 17.5 hours per week and full-time employees are employed on the basis of thirty-five (35) weekly hours. Part-time teacher aides are employed in school situations where the student/teacher ratio is too large for one teacher to handle. Three such persons are employed by the respondent. Mr. Mitchell could not give examples of regular inter-change between full-time and part-time teacher aides, but he understood that either group would be looked to first in the filling of vacancies. The respondent staffs its schools by way of a formula tied to enrollment and both the elementary and secondary school formulae indicate the allocation of one part-time typist at a particular enrollment range. Vocational schools are provided with a part-time typist as well. Mr. Mitchell testified that part-time typists work in the business office answering the telephone, completing reports and typing exams. Over time there has been some interchange between the employer's full-time and part-time employees. The Board was given a number of examples of employees moving from full-time to part-time and back to full-time employment over the course of their careers with the respondent. Mr. Mitchell also indicated that declining enrollment may require a school, by way of the staffing formula, to employ a part-time typist instead of a full-time typist. In such circumstances the full-time typist would be asked to consider the possibility of part-time employment.

9. Our attention was drawn to page 41 of the respondent's Personnel Policy Manual (Non-Teaching Employees) to contrast permanent part-time employment with temporary or casual full-time (or possibly part-time) employment. The provision at page 41 indicates "[s]upply clerical or peak load assistance to schools and to the administrative offices during extended periods of staff illness, maternity or compassionate leaves of absence or for special projects." Supply employees are paid a straight hourly rate on the basis of time sheets they complete at the end of each assignment. On the other hand, terms and conditions of employment of full and part-time employees are almost indistinguishable. They are provided with the same fringe benefits with appropriate correction for the reduced hours of part-time employees; the part-time salary rate is a precise one-half of the full-time salary rate. Both part-time and full-time positions are posted and both groups of employees are able to bid for such posted vacancies. Mr. Mitchell also described the duties of three part-time cafeteria aides employed in three smaller vocational schools. The working conditions of the full-time and part-time cafeteria aides are identical.

10. It was the respondent's submission that on the evidence presented the Board should find a community of interest between the full-time and permanent part-time employees and that the Board's usual approach to employees so employed ought not to prevail. Counsel submitted that the Board's usual separation of part-time and full-time employees was based on employment relations in an industrial context and had no application to the white collar office setting of the respondent. On the other hand, the respondent submitted that casual or temporary employees had no community of interest with full-time staff and ought to be excluded from any appropriate bargaining unit. Counsel for the respondent directed the Board's attention to a number of decisions of the Canada Labour Relations Board in support of the propositions agreed to before us. They included *Charterways Co. Limited and Hitchens et al* (interveners) 74 CLLC ¶16,097; *Radio Station CHQM, Division of 2 Broadcasting Ltd.* (1975), 11 di 16; *Canadian Imperial Bank of Commerce* (1977), 77 CLLC ¶16,091; *Canadian Imperial Bank of Commerce* (1977), 25 di 355; and *Holmes Transportation (Quebec) Ltd.*, (1977), 20 di 306. The applicant union, on the other hand, submitted that it had relied on the Board's usual practice in organizing the respondent's employees and that, in any event, the facts before the Board were not exceptional and deserving of special treatment.

11. The Board recently dealt with a similar request to review its bargaining unit configuration policy on part-time and full-time employees in *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330. The Board outlined the purpose of its usual approach in these kinds of cases in the following terms:

The Board's general practice concerning exclusion of part-time employees and students from full-time bargaining units is set forth in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. Mar. 324. (See also *The Post Printing Company Ltd., a division of Thomson Newspapers Limited (Leamington)*, [1966] OLRB Rep. Mar. 930; *Premier Plastics Limited*, [1969] OLRB Rep. July 508; *Wilson-Monroe Company Ltd.*, [1973] OLRB Rep. Dec. 647; and *The Beacon Herald of Stratford Limited*, [1975] OLRB Rep. Feb. 103.) This practice reflects the Board's view, supported by the extensive labour relations experience and knowledge of its members, that part-time employees and students, on the one hand, and full-time employees, on the other hand, do not generally share a community of interest since the former are primarily concerned with maintaining a convenient work schedule which permits them to accommodate the other important aspects of their lives with their work and with obtaining short-term immediate improvements in remuneration rather than with obtaining life insurance, pension, disability, and other benefit plans; extensive seniority clauses; and other long-term benefits. See, for example, *Leon's Furniture Limited*, [1976] OLRB Rep. May 232, paragraph 5, in which the Board stated:

"... we have learned through experience in such applications that part-time employees do not share a community of interest with full-time employees in many aspects of the collective bargaining scenario. More precisely part-time employees are more pragmatically concerned with immediate as opposed to long-term benefits with respect to improving their terms and conditions of employment. In applying this proposition to more practical issues the part-

time employee usually prefers to sacrifice long-term pension, medical and other welfare benefits for a more substantial increase in wages or a longer vacation period. The nature of seniority provisions contained in a collective agreement with respect to promotions, transfer and lay-offs does not always assume the same degree of significance to the part-time employees as it would to the full-time employee. In other words, the Board has discerned a natural, inevitable schism in measuring the community of interest between the two categories of employees that invite separation into peculiar bargaining units . . .”

For the foregoing reasons, part-time employees and students generally tend to have less initial interest in collective bargaining. Moreover, since the union organizing campaign may give rise to considerable uncertainty and apprehension among part-time employees and students with respect to the continued accommodation of their particular needs and desires for a convenient work schedule and maximum short-term remuneration, they are prone to oppose applications for certification. Such opposition could preclude full-time employees from engaging in collective bargaining if the Board generally exercised its discretion under section 6(1) of the Act in favour of bargaining units which included not only full-time employees but also part-time employees and students. Accordingly, the Board’s practice concerning part-time employees and students is not only a policy designed to avoid difficulties which may arise where groups with separate communities of interest are included in a single bargaining unit but is also an organizing rule which promotes the public interest, identified in the preamble of *The Labour Relations Act*, in furthering harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

12. We are of the view that the case before us presents much less compelling evidence for the requested inclusion of the so-called permanent part-time employees than existed in the *Toronto Airport Hilton* case. The employees in question work precisely one-half the hours of full-time employees and this fact is usually the critical advantage flowing to those employees attracted to part-time work. It is this reality that allows them to accommodate the other important aspects of their lives in a much more substantial way than full-time employment allows. For example, a 1976 study revealed that key reasons given for working part-time included: “going to school”, “personal or family responsibilities” and “not wanting to work ‘full-time’.” See Robertson, *Part-time Work in Ontario: 1966 to 1976*, Research Branch, Ontario Ministry of Labour, August 1976, Study No. 20, page 18. The fact that part-time employees perform the same work under the same conditions as full-time employees and the fact that their terms and conditions of employment are similar are not unusual facts in pre-collective bargaining employment patterns and pale in comparison to respective attachments to the work place of full and part-time employees. As the panel in *Toronto Airport Hilton* case, *supra*, indicated, it is this Board’s experience that part-time employees have less initial interest in collective bargaining than do full-time employees because of the aforementioned attraction of part-time work. Indeed, it is our opinion that collective bargaining would have

been impeded for entire industries had this Board taken any other view. It is unconstructive to point to situations where parties are now providing for part-time and full-time employees in one collective agreement (and even here many qualifications have to be inserted). This is the end result of collective bargaining, after a relationship has matured and after the parties have come to an understanding over the proper balance of full-time to part-time work. In fact, without such an understanding, full-time and part-time employees may come into dramatic opposition should an employer decide to rely more heavily on part-time employees for reasons of economy and/or administrative efficiency. Finally, it is important to stress that none of the above deprives part-time employees of collective bargaining. Our approach responds only to the appropriateness of any bargaining unit where a party asks the Board to require their inclusion with regular full-time employees.

13. In the facts at hand the respondent points to the common terms of employment as evidence of a community justifying one bargaining unit. As noted above, these factors do not go to the different appetites for collective bargaining exhibited by these two distinct groups of employees regardless of industry. Moreover, such factors are often the product of unilateral employer action and, thus, unreliable indicators of employee interests. There is no indication that the respondent provided similar conditions of employment in response to employee demands or marketplace pressures. The interchange between full-time and part-time employment in evidence before us is also not unusual and is a phenomenon that can be accommodated by the collective bargaining process. This is not a case where there is no identifiable group of employees hired to work part-time as in *Paris Poultry Products Limited*, [1978] OLRB Rep. May 453; *Canadian Pacific Railway Company, Royal York Hotel Case*, [1960] OLRB Rep. May 1960; and in the construction industry. On the related issue of casual or temporary employees, our practice has been against making distinctions between permanent and temporary employees. See *Sydenham District Hospital*, [1967] OLRB Rep. May 135 at page 137. In a volatile economy, such distinctions can become quite illusory. We have found that many work forces can be characterized at the margin as more or less temporary. See *Laing & Sons Limited*, [1961] OLRB Rep. Dec. 279; *Peter Austin Manufacturing Co.*, [1967] OLRB Rep. May 144; *Universal Cooler*, [1967] OLRB Rep. Sept. 546. However, employees employed on a truly "seasonal" basis may well merit a separate unit depending on when the application is brought. See *Melnor Manufacturing Ltd.*, [1969] OLRB Rep. Mar. 1288. But in the facts at hand this rule or approach has no application. Accordingly, casual or temporary employees employed in full-time capacity on the date of application are to be included in the bargaining unit and part-time employees, whether permanent or casual, are to be excluded.

14. However, all of the foregoing should not prevent the Board from reviewing whether the twenty-four hour standard ought to be revised downward to at least twenty (20) hours in light of the changes in employment patterns that have occurred over the years. The current twenty-four hour standard is a longstanding policy whose origin probably dates back to the War Labour Board years (see *Snyders Ltd.* (1946), 46 CLLC ¶16,457; *Davis Leather Co. Ltd.* (1947), 47 CLLC ¶16,491; and *T.A. Collins Transport Ltd.*, [1966] OLRB Rep. Oct. 504). Unfortunately, such a review is not practical in the context of a particular case because of the related amendments to the Board's forms that would be necessary (see *Form 3 - O. Reg. 32/73*, s.8; *Form 4 - R.R.O. 1970, Reg. 551*, as amended by *O. Reg. 474/71*; *Form 17 - O. Reg. 321/73*, s.10; and *Form 51 - R.R.O. 1970, Reg. 551*, as amended by *O. Reg. 474/71*). There would also be the problem of the operative date of any change.

15. *Secretaries to Secondary School Principals*

The labour relations officer's report reveals twenty-five persons are so employed and that the parties agreed that the evidence of M. Thompson, R. Bacchus, F. Maidens and D. Ferguson is to be considered representative of the duties and responsibilities of all twenty-five. The respondent seeks their exclusion on the basis of both legs of section 1(3)(b). The section provides:

- Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee
- (b) who in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The Board's approach to the managerial functions aspect of the section was exhaustively reviewed and analyzed in *McIntyre Porcupine Mines Ltd.* [1975] OLRB Rep. April 261. Its particular application to white collar and professional workplace settings has been reviewed in *Toronto East General*, [1974] OLRB Rep. Oct. 671 and *Spar Aerospace Products Ltd.*, [1979] OLRB Rep. July 700. Most recently see *The Regional Municipality of Halton*, [1980] OLRB Rep. Nov. 1684. The effect of both approaches is nicely summarized at paragraph 12 of *The Lakehead Board of Education* case, [1970] OLRB Rep. Feb. 1331, also dealing with the status of secretaries in secondary schools:

"Making a determination as to whether a person is employed in a managerial capacity is a more difficult assessment to make. The Board in a number of recent decisions has recognized the growing complexity of management structures, the diffusion of the lines of authority and the divergent elements that go into the decision making process. The Board, accordingly, in making such determination endeavours to distinguish between persons who truly exercise independent discretion or assert real authority, as opposed to those who merely implement decisions within a framework decided by others or whose independent discretion is limited to predetermined circumscribed areas. The Board is cognizant of the fact also that management today generally needs the assistance and advice of responsible and highly qualified individuals in the fields of their particular knowledge. The fact that such assistance or advice is sought and is accepted or taken into account by management does not mean that such persons exercise managerial functions in their own right. In all cases, the Board must evaluate the totality of each person's job functions in deciding whether the person concerned in an intrinsic sense, exercises managerial authority (see *The Hydro-Electric Power Commission of Ontario Case*, [1969] OLRB Rep. Aug. 669, and *Ajax and Pickering General Hospital Case*, dated February 19, 1970, Board File No. 15917-68-R)."

16. The second aspect of the subsection — "employed in a confidential capacity in matters relating to labour relations" - has been held to require a "regular material involvement" in such matters. A good review of section 1(3)(b) from this perspective is found in *Comtech Group Ltd.*, [1974] OLRB Rep. May 291 where at paragraph 13 the Board observed:

“... the conflict of interest as envisioned in the statutory exclusion, relates to a person being “employed” in such a capacity and to which, in the normal course of his employment, such a person has access to labour relations matters which if disclosed to the union bargaining on his behalf, would have an adverse effect upon the employer.”

In reaching this conclusion, we find solace in the recent decision of the Board dated April 8, 1974, in the *Metropolitan Separate School Board* case (Board File No. 4442-73-U) where in paragraph 9 the Board stated as follows:

“In order that this decision be not misunderstood the Board stresses that the words “employed” as used in s.1(3)(b) must be rendered the meaning the Legislature intended. Had Miss Thomas as part of her duties and responsibilities, attended meetings where union management negotiations were discussed this Board would have no misgivings in excluding her from the bargaining unit. That is to say, such exposure would be integral to her job function. There must be “a regular material involvement” in matters relating to labour relations to justify exclusion from the bargaining unit (see; *Falconbridge Nickel Mines Ltd.* [1966] OLRB Rep. Sept. 379, at p. 388-9). For example, persons employed as accountants who prepare financial statements and attend management meetings, (see *Burns and Company Ltd.* [1965] OLRB Rep. April 1; or personnel stenographers and plant nurses who as a necessary incident to the performance of secretarial or nursing duties have access to personnel files (see; *Canadian Motor Lamp Company Case* [1969] OLRB Rep. May 189; *Canadian Filters Limited Case* [1967] OLRB Rep. April 36); and “technical advisers” such as time study technicians who require information derived from confidential files to perform their duties, (see; *Boyles Industries Case* [1971] OLRB Rep. March 111; *Canadian Acme Screw and Gear Limited Case* [1967] OLRB Rep. Feb. 872 have been held by the Board to be persons who are employed in a confidential capacity relating to labour relations!”

In the result, we conclude that the purpose of the legislation is to, in effect, “insulate” an employee, who in the normal course of his employment and as part of his regular duties, is directly involved in matters relating to the labour relations of his employer. In this regard, we are satisfied that the legislation, as such, is not primarily concerned with the nature of that employer’s business. In the instant case, the evidence fails to disclose any material involvement by the employees subject to this application with any confidential information relating directly to the labour relations aspects of the respondent. Accordingly, we reject the respondent’s submissions relating to its primary position that the employees as encompassed in the bargaining unit as initially proposed by the applicant, are inappropriate for inclusion therein because they exercise confidential duties within the meaning of s.1(3)(b) of the Act.

17. One posting for the position of Secretary to Principal dated December 1, 1978 reads:

Consideration will be given to all written applications received by the Personnel Department on or before 4:30 p.m., Friday, December 8, 1978.

All those applying must be on permanent staff and possess the required qualifications.

POSITION: SECRETARY TO PRINCIPAL — SECONDARY SCHOOL 12 Months per year - 5 days per week

QUALIFICATIONS: APPLICANTS MUST POSSESS GOOD TYPING SHORTHAND SKILLS AND A THOROUGH KNOWLEDGE OF SECRETARIAL AND OFFICE PROCEDURES. THE SUCCESSFUL APPLICANT WILL ALSO POSSESS A HIGH DEGREE OF INITIATIVE AND ORGANIZATIONAL ABILITY AND BE CAPABLE OF COMMUNICATING EFFECTIVELY WITH ALL LEVELS OF STAFF, STUDENTS AND THE GENERAL PUBLIC. EXPERIENCE IN BOOKKEEPING AND BUDGET PROCEDURES WILL BE A DEFINITE ASSET.

JOB DESCRIPTION: RESPONSIBILITIES WILL INCLUDE SECRETARIAL DUTIES FOR THE PRINCIPAL PLUS DISTRIBUTION AND SUPERVISION OF WORK TO OTHER MEMBERS OF THE OFFICE STAFF.

SALARY RANGE: LEVEL V, SCHEDULE 1
\$236.56 - \$279.80 per week

LOCATION: DR. NORMAN BETHUNE COLLEGE INSTITUTE,
20 Fundy Bay Boulevard,
Agincourt.

DATE AVAILABLE:

A job description describing the duties of a Head Secretary was filed with the Board and provides:

(a) *Head Secretary:*

- (i) Responsible to the principal of the school for the preparation of reports and information for the Ministry of Education, the Scarborough Board of Education, and other agencies. This includes the preparation of the Principal's Statement, the Principal's Annual Statistical Report, teachers' timetables for

transmission to the Personnel and Administration Department and others.

- (ii) The preparation of lists of teachers who must be inspected for recommendation for permanent certificates or a recommendation to enable them to attend the Type A seminars, etc.
- (iii) The allocation of the duties of the other secretaries in the general office and the supervision of their work.
- (iv) The preparation and custody of the principal's correspondence.
- (v) The preparation of memoranda from the principal to department heads, other staff members, and to the Board officials.
- (vi) The maintenance of teacher information files with details of experience, certificates, etc.
- (vii) Arrangement of principal's appointments with parents, students, teachers, and other persons having business with the school.
- (viii) The preparation of daily and monthly occasional teachers' reports, and the receiving of teacher absences.

Maureen Thompson has been a "head secretary" since January 28, 1980. She describes her secretary duties as including: to go over daily work; to take part in administrative meetings with principal and vice-principal; the performance of ongoing office work; assisting in the replacement of absent office staff; looking after teachers' records and files; the co-ordination of office staff; liaising between the principals of night and day schools; and the taking of minutes at weekly administrative meetings between the principal and vice-principal. There are seven employees under her direction and control, five of whom are located in the same office. She testified she is responsible for the quality of their work and co-ordinates their efforts when necessary. Her assignments of work are subject to the principal's approval. There appears to be no formal evaluation process in which she participates and she has no authority to hire employees. However, she does conduct hiring interviews with the principal and her views are listened to. She thought she had the power to issue a verbal warning but has never done so. She grants time off but it must be made up. She has no real involvement in the formulation or administration of the school budget. The files pertaining to teachers are the responsibility of the principal. She maintains them and the files are open to teachers but not to other office staff. She testified that she has, on occasion, provided the principal with an evaluation of probationary employees and other employees when asked and perceived that such evaluations were generally acted on.

18. Rita Bacchus has been secretary to a principal for the last nine years. She has been told that her duties include the supervision of other secretaries. She is responsible for five secretaries, two of whom are located in the same office. She has responsibilities for allocating

work and problems over work quality have been brought to her attention. She has made hiring recommendations to the principal six or seven times and all such recommendations have been acted upon. She has been asked for her views on probationary employees and her recommendations in this respect have acted upon. She has issued only two verbal warnings and all discipline is cleared with the principal first. She grants time off which must be made up. She tries to resolve all office problems in the hope of avoiding the principal's involvement. There have been no absenteeism problems for her to deal with. She apparently talks to each member of the office staff about her performance annually. There are no formal reports arising out of such meetings, however. She testified she is not involved with teachers' files very often.

19. Flora Maidens has been the secretary to a principal for five years. She described her daily routine as: making appointments with the principal; screening telephone calls; typing and composing correspondence; handling confidential teacher reports; assigning duties to general office staff; sitting in on staff meetings; gathering material for budget; and general office duties. She testified that supervision is not a "direct type" but an informal observance of "general goings on." The assignment of work is generally done on an annual basis. She participates in hiring interviews but the principal makes the final decision (six or seven individuals have been hired). She did not think she had any authority to discipline and has never done it. She is able to grant short periods of time off but the time must be made up. The principal has asked her to suggest the office budget but these recommendations may be modified. She takes minutes at a monthly meeting of department heads and sits in on staff meetings (1) to answer questions regarding the office and (2) to be aware of what is going on in the school generally. The more confidential files are kept in the principal's office. She has access to teachers' files and budget files. She opens all correspondence sent to the school. There have been occasions where she has warned employees about the quality of their work. She types confidential memoranda pertaining to teachers.

20. Doris Ferguson has been the secretary to a principal for eight years. She saw her responsibilities as being of a management type in the sense of ensuring a smooth running office. She takes minutes at staff meetings. There are five secretaries under her direction and work assignments are usually on a daily basis. Supervision is on an informal basis. She participates in the hiring process and her recommendations are generally accepted. The principal regularly asks for her evaluation of probationary employees. She is able to give verbal and written warnings on her own initiative but she had no occasion to do so. She also participates in the evaluation of permanent employees. Any time granted off is made up. She handles vacation schedules on the basis of seniority. Only she and the principal have access to the personal files of the employees under her supervision. She does not deal with these files very frequently and has no involvement with the principal's confidential files. She opens all the principal's mail.

21. From the evidence of R.A. Mitchell, it is apparent that a head secretary may have direct contact with the Personnel Office in the areas of hiring, discipline, attendance, temporary staff, etc. It is also apparent that the principal is quite dependent on the opinion of his secretary in evaluating the performance of office staff. There has been at least one workshop for head secretaries aimed at increasing their communication skills and their appreciation of the head secretary's role. If the Personnel Office wishes a reference in regard to inter-school personal transfers, it approaches the head secretary.

22. On the basis of all this evidence we are satisfied that a head secretary or secretary to a principal either exercises managerial functions or exhibits a regular and material involvement in matters relating to labour relations to justify exclusion from the bargaining unit. While there may be some doubt on the available evidence whether the head secretary's authority in relation to other employees reaches the level of recommendations that "materially affects the economic lives" of such employees, the same evidence does reveal a regular involvement in confidential matters relating to labour relations, i.e. discipline, hiring, evaluation, access to confidential memoranda sent to the principal, etc. The evidence also suggests that each school is an administrative unit managed by the principal. In this light, the principal's reliance upon his secretary in matters relating to employee relations is somewhat obvious. Accordingly, we find that all office, clerical, technical employees, teacher aides, and cafeteria aides of the Board of Education for the Borough of Scarborough employed in the Borough of Scarborough save and except supervisors, persons above the rank of supervisors, persons regularly employed for not more than twenty-four (24) hours per week, students, and those employed in positions set out in Appendix "A" constitutes an appropriate unit for collective bargaining. Appendix "A" now provides:

(a) Secretaries to the following:

Assistant Director of Education, Superintendent of Planning & Operations, Superintendent of Student & Community Services, Superintendent of Program, Superintendent of Plant, Comptroller of Finance, Assistant Superintendent of Planning & Operations, Assistant Superintendent of Student & Community Services, Assistant Superintendent of Program, Financial Advisor, Chief Engineer, Purchasing Agent, Manager — Data Processing, Area Superintendents, *Principals*;

(b) All persons employed in the office of the Director of Education;

(c) All persons employed in the Communications office;

(d) All persons employed in the Personnel Department;

(e) All persons employed in the following positions:

Assistant Operating Engineer, Clerk "A" maintenance, Itinerant Music Teacher, Librarian, Security Officer, Senior Systems Analyst, Speech Pathologist, Systems Analyst, Physiotherapist, Psychometrician, Teaching Assistant (Waterloo Co-op), Water Safety Assistant;

(f) All persons covered by subsisting collective agreements between the Board of Education for the Borough of Scarborough and: (i) Canadian Union of Public Employees Local 149; (ii) Canadian Union of Public Employees, and its local 149; and (iii) The Association of Professional Student Services Personnel, Scarborough Chapter.

On the agreement of the parties it is understood that students means a bona fide student who: (i) is taking a minimum of 151 minutes per day instruction in a school; (ii) is engaged in a co-operative education work

experience program which is part of the student credit program; (iii) is taking his/her education, in a school on a semestered program; and (iv) is employed during his/her vacation period.

23. On the basis of all of the foregoing, the applicant union was clearly entitled to have the pre-hearing vote conducted as it requested. The Board, therefore, directs that the ballot box be unsealed and all ballots cast by those persons found to be employed in the appropriate bargaining unit be counted.

1277-80-R Cambridge Employees' Association, Applicant, v. Dan Hotel Company Limited, Taddy Hotel Company Limited and Gill Hotel Company operating under the name and style of **Cambridge Motor Hotel**, Respondent, v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.L.C.-C.I.O.), Intervener.

Certification – Trade Union Status – Competing applications for certification – Whether one applicant supported by management – Applicant proving status

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members D.B. Archer and F.W. Murray.

APPEARANCES: *M. Horan and L. Danko for the applicant; J.P. Wearing for the respondent; and A. Ryder Q.C. for the intervener.*

DECISION OF THE BOARD: December 3, 1980

1. The parties are in agreement that the name of the respondent on the style of cause should be amended to read "Dan Hotel Company Limited, Taddy Hotel Company Limited and Gill Hotel Company Limited operating under the name and style of Cambridge Motor Hotel".

2. This is an application for certification which also involves an application for certification by the intervener.

3. At the hearing the Board heard evidence concerning the applicant's status as a trade union. On the basis of this evidence we are satisfied that the following events occurred on or about July 17, 1980, namely:

1. a number of employees of the respondent met and voted to constitute themselves as a trade union to be known as Cambridge Employees Association ("The Association");

2. the employees considered a draft constitution for the Association.

The draft constitution listed one of the objects of the Association as being to regulate relations between employees and employers. The draft constitution contained the type of provisions generally found in union constitutions;

3. the employees voted unanimously to approve the draft constitution;
4. the employees present applied for membership in the Association and paid a \$1.00 to the Association as an initiation fee;
5. the members of the Association unanimously voted to ratify the constitution as previously approved;
6. officers were elected to fill the executive positions provided for in the constitution. There was no one nominated to fill the position of secretary, and a motion was carried to fill the position at a later date in accordance with the provisions in the constitution relating to executive vacancies;

We are satisfied that the steps set out above were sufficient to constitute the applicant as a trade union.

4. Counsel for the intervener contended that the applicant lacked status as a trade union, or was precluded from being certified by the provisions of section 12 of the Act, in that it had received employer support. This contention related to the manner by which Mr. Danko, the applicant's president, learnt of the name of Mr. Horan, the applicant's counsel. According to Mr. Danko, there had been an earlier proceeding before the Board in which the intervener had applied to be certified to represent the respondent's employees. Mr. Danko testified that he had been upset with the application and had asked the respondent's general manager for the name of a lawyer who was familiar with the Labour Board. Subsequently, Mr. Danko was given the name of Mr. Horan. Mr. Danko did not contact Mr. Horan at the time, and indeed it appears that Mr. Danko took no steps with respect to the earlier certification proceedings. The intervener withdrew its earlier application on June 2, 1980. Mr. Horan was later retained by Mr. Danko and certain other employees to act in this matter. The evidence establishes that Mr. Horan will be paid by the employees. The Board is of the view that although the manner in which Mr. Danko learned of Mr. Horan's name may give rise to a concern about possible management support for the applicant, the evidence is not sufficient to support a finding that the applicant has received management support such as to deprive it of the status of a trade union or bar it from being certified pursuant to section 12 of the Act.

5. Having regard to our conclusions, set out above, the Board finds that "Cambridge Employees' Association" is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

6. As indicated earlier, both the applicant and intervener are currently seeking to be certified. Both propose different bargaining unit descriptions. However, it is clear that whatever unit the Board might find appropriate with respect to the intervener's application, the intervener has filed evidence of membership on behalf of fewer than thirty-five per cent of

the employees in the unit. Accordingly, the intervener's request that it be certified is dismissed.

• • •

9. A certificate will issue to the applicant.

1803-80-R District Lodge 717, International Association of Machinists and Aerospace Workers, Applicant, v. **Canada Valve Limited**, Respondent.

Certification – Membership Evidence – Pre-Hearing Vote – Cards showing name of international union – Applicant local not identified – Whether evidence of membership acceptable

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL; December 10, 1980

1. This is an application filed pursuant to section 8 of *The Labour Relations Act* in which the applicant has requested that a pre-hearing representation vote be held. Having regard for the Board's discretion under section 8(2) to direct that a pre-hearing representation vote be held if the applicant appears to have the support of not less than thirty-five cent of employees in the voting constituency determined by the Board, and for the fact that all of the persons whom the applicant claims to represent have applied for membership in a trade union other than the applicant, the Board declines to direct that a pre-hearing representation vote be held.

2. In the result, the application is dismissed.

CONCURRING OPINION OF BOARD MEMBER O. HODGES:

1. The dismissal of this application follows the long established practice of the Board. In policy matters which appear to require revision the Board looks to future cases rather than the instant case. In my view the policy and practice with regard to the present case should be amended.

2. The present practice is to accept as evidence of union membership, application cards indicating membership in a local of the organization to which the local is affiliated, e.g., a national or international trade union, when the certification application to the Board is made in the name of the parent organization. Application cards made in the name of the parent organization only, *without* local identification are also acceptable when the application for certification is made in the name of the parent organization. However, when an application for certification is made in the name of a local, the application for membership cards must show the local identification corresponding to the name on the application for certification.

3. One reason for the practice followed is to ensure that the applicant for union membership may be certain of the organization that seeks to become his bargaining agent. As a general rule the Board has always required that membership evidence on its face relate to the applicant. See *Canadian Home Products Ltd.*, 60 CLLC ¶ 16,173.

4. In the present case the applicant for certification "District Lodge 717, International Association of Machinists and Aerospace Workers" neglected to show "District Lodge 717" in the space provided for local identification on the printed application for membership cards. The printed cards are in the name of "International Association of Machinists and Aerospace Workers".

5. The procedures of the Board should be altered in my opinion, to provide an opportunity for the applicant for certification to amend the style of cause immediately upon the Board receiving the document and the application for membership cards and before any further processing of the application for certification. Thus no notice to the employer or to other interested parties nor any posting would be made until the application were amended. In the present case this could have been accomplished simply by striking out the words "District Lodge 717" on the application for certification form. Obviously the procedural change suggested here could avoid making a new application. The time of the Board in processing a second application would thus be saved. Clearly any delay for the trade union in the certification process must be avoided wherever possible.

6. The applicant in the present case must now make a new application in the name of "International Association of Machinists and Aerospace Workers" and reapply using the same application for membership cards. In the alternative, if the application is again filed in the name "District Lodge 717, International Association of Machinists and Aerospace Workers", each application for membership card must have added, *with the knowledge of the person who signed the card*, the local identification "District Lodge 717", so that the cards are in the same name as the application for certification by the local union.

7. The circumstances of this case arise frequently enough to warrant the suggested alteration. The Board can and should do so forthwith.

0269-80-R United Brotherhood of Carpenters and Joiners of America, Applicant, v. Colonist Homes Ltd., Respondent, v. Group of Employees, Objectors

Bargaining Unit – Certification – Construction Industry – Whether Board issuing ICI certificate when no employees in that sector – Whether Respondent's employees in particular board area alone or in whole Province relevant in assessing membership support

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members J. A. Ronson and M. Ross.

APPEARANCES: *J. J. Nyman for the Applicant; no one for the Respondent or group of employees.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER M. ROSS; December 31, 1980

1. In this application for certification the applicant filed four certificates of membership. The certificates are signed by the members and indicate that monthly dues of \$24.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The certificates are checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, but no list of employees. However, on the basis of the report of a Labour Relations Officer appointed in this matter, it appears that on the application date the respondent employed the following employees, namely:

- a) five carpenters engaged in residential construction in Grey County;
- b) four persons engaged in residential construction outside of Grey County;
- c) six persons performing work outside of the construction industry;
- d) one person who divided his time between a residential building project outside of Grey County and certain non-construction work.

3. We find that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*. We further find that the applicant is a trade union within the meaning of section 1(1)(n) of the Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 127(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

4. The applicant has requested that the bargaining unit be described in terms of "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other

sectors of the construction industry in the County of Grey". The applicant contends that this is an appropriate description in light of the provisions of section 131a of the Act. Section 131a states as follows:

(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106 shall be brought by either, on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 1 of section 108, a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

5. As far as the applicant is concerned, this is an application for certification "which relates to the industrial, commercial and institutional sector" even though the respondent employed no employees in this sector on the date of the making of this application. In support of this position, the applicant filed a written submission which states, in part, as follows:

It is the position and the submission of the Applicant that the determination of whether an application for certification "relates to the industrial, commercial and institutional sector of the construction industry" and so falls within the provisions of Section 131a(1) of the Act or whether an application for certification "relates to all sectors of a geographic area other than the industrial, commercial and institutional sector of the construction industry" and so falls within the provisions of Section 131a(3) of the Act is the exclusive function of the Applicant trade

union. In this regard, the Applicant trade union may determine that the application should be treated as falling within Section 131a(1) of the Act or as falling within Section 131a(3) of the Act, or may decide that the application should be treated as falling within section 131a(1) of the Act and, in the alternative, Section 131a(3).

It is submitted that were the Board to hold that it and not the Applicant trade union is to determine whether the application relates to the industrial, commercial and institutional sector or to all other sectors, i.e., whether the application should be treated as falling within Section 131a(1) or Section 131a(3) of the Act, then certain of the fundamental objects and purposes of Bill 73 will have been defeated. Such an interpretation, it is submitted, would require the Board at the very outset of every certification proceeding to ascertain which sectors the employees of the Respondent subject to the application were working within on the application date.

Bill 73 as the Board is well aware followed from recommendations contained in a Report to the Minister of Labour prepared and submitted by Mr. George W. Adams. Chairman Adams had been specifically appointed and requested by the Minister in early 1980 to inquire into various concerns related to the implementations and administration of Bill 204 raised by the Toronto-Central Ontario Building and Construction Trades Council. Included among the concerns voiced by the Council were a number of issues of a technical nature which related specifically to certification applications and the effects thereof, of the introduction of the concept of sector for the first time into certification proceedings. From the Council's perspective, Bill 204 as worded created the very distinct possibility that a trade union might acquire fewer bargaining rights for a geographic area in a certification proceeding than it would have acquired prior to its enactment. Just as importantly, the introduction of the sector concept into certification applications was regarded as creating a significant potential for delay in the certification process, a concern which had caused the Board in the past to consistently reject a sector approach to certification proceedings.

In recognition of the validity of these concerns, Chairman Adams made certain recommendations which were incorporated into the provisions of Bill 73. In essence, Bill 73 was designated in part to ensure:

- (a) that as a result of the extension of bargaining rights in the industrial, commercial and institutional sector, a trade union in acquiring bargaining rights through the certification process would not find itself in a position where it would acquire fewer bargaining rights than it would have acquired prior to May 1, 1980.
- (b) that the need for defining and determining sectors in certification proceedings would be reduced generally, and moreover,

completely eliminated where “the employer only employs employees in one geographic area.”

The Officer’s Report establishes that on the date of application, the Respondent did not employ any employees in the I.C.I. sector outside of the County of Grey. Even if the Applicant were to concede that the five employees employed by the Respondent in County of Grey on the application date were employed in a sector other than the I.C.I. sector, the Applicant maintains that it is entitled to be certified for the unit described in Section 131a(1) of the Act and entitled to the two certificates provided for in Section 131a(2) of the Act. In other words, in order for an application to relate to “the industrial, commercial and institutional sector of the construction industry” there is no requirement upon the Applicant to demonstrate to the Board or for the Board to find that the Respondent as of the Application date had one or more employees employed in the I.C.I. sector.

In this regard, we again draw to the Board’s attention the clear intent of Bill 73 as expressed in Chairman Adams’ report to the Minister. Specifically as noted above, Chairman Adams stated on page 28 of his Report that the proposed amendments to Bill 204 set out in the preceding two pages of the Report would eliminate the necessity of the Board making sector determinations where the employer employs employees in only one geographic area. Accordingly, as we understand those comments, it was clearly intended that Section 131a(1) of the Act would set out an appropriate unit where the employer operated in a single geographic area regardless of which sector or sectors the employer was then working within. Therefore, it was clearly intended that Section 131a(1) of the Act would set out an appropriate unit even where the employer operating in a single geographic area did not employ any employees in the I.C.I. sector. Accordingly, whether an application “relates to the industrial, commercial and institutional sector of the construction industry” as those words are used in Section 131a(1) is *not* contingent upon the existence of one or more employees working in that sector.

While it is true that comments made by Chairman Adams alluded to above deal with a single geographic area employer, the Applicant submits that there are no valid labour relations reasons militating against their applicability in a situation where the employer operates in more than one geographic area in sectors other than the I.C.I. sector. If Section 131a(1) of the Act applies to a single geographic area employer regardless of whether it has employees working in the I.C.I. sector, then surely the same holds true in the case of a multi-geographic area employer. The language of Section 131a(1) does not draw a distinction between single and multi-geographic area employers. Moreover, if the Applicant is certified for a unit described by reference to Section 131a(1) it does not acquire any bargaining rights for those employees employed outside of the County of Grey in sectors other than the I.C.I. sector.

Finally, the Applicant submits that if the Board were to find that the appropriate unit should be described by reference to Section 131a(3) of the Act, the Applicant would acquire fewer bargaining rights for the County of Grey than it would have acquired prior to the enactment of Bill 204 or Bill 73, a result clearly antithetical to objects of Bill 73.

6. In its reply the respondent proposed that the bargaining unit should be described in terms of carpenters and carpenters' apprentices in the County of Grey without any reference to sector. The respondent did not address itself to the provisions of section 131a. The respondent also made no response to the submissions of the applicant set out above.

7. Lacking any submissions on this point from the respondent, we are prepared in these proceedings to accept the applicant's contention that for an application for certification to relate to the industrial, commercial and institutional sector under section 131a(1) the application need only be with respect to a bargaining unit described so as to include this sector within its scope, and that it is not necessary that employees actually be working in the sector on the date of the making of the application. In this regard we find persuasive the applicant's contention that the amendments to the Act resulting in the current wording of section 131a were not meant to either result in a trade union acquiring fewer bargaining rights in a Board area than it would have prior to May 1, 1980, or to require that a determination be made in each case as to what sector employees are working in within the relevant Board area.

8. We have also taken into account the Legislative history of section 131a. As originally enacted (S.O. 1979, c. 113, s. 2) section 131(1) read as follows:

An application for certification as bargaining agent *for the employees of an employer employed in the industrial, commercial and institutional sector* of the construction industry referred to in clause e of section 106 may only be brought by a designated or certified employee bargaining agency on behalf of all the affiliated bargaining agents it represents, and the unit of employees that is appropriate for collective bargaining shall be those employees who would be bound by a provincial agreement. [emphasis added]

The original wording of this section clearly envisaged applications for certification limited solely to the industrial, commercial and institutional sector in circumstances where the employer actually had employees working in that sector. Subsequent to the release of the Adams Report, section 131a was repealed and the current wording enacted. The current wording requires that a bargaining unit relating to the industrial, commercial and institutional sector also encompass all other sectors in an appropriate geographic area unless the bargaining rights for the area have already been acquired. Further, the section no longer requires that the application be for "*employees . . . employed in the industrial, commercial and institutional sector*", but instead refers to "*an application for certification as bargaining agent which relates to the industrial, commercial and institutional sector*". In other words, the previous express requirement that there be employees in the industrial, commercial and institutional sector has been dropped. This, in our view, strongly supports the proposition that under the current language where there are no employees working in the industrial, commercial and institutional sector, an application can still relate to that sector provided the scope of the bargaining unit applied for encompasses that as well as other sectors.

9. Having regard to our conclusion set out above, and pursuant to section 131a(1) of the Act, we find that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The bargaining unit set out above encompasses in its scope, as required by the terms of section 131a, all employees who would be bound by a provincial agreement (i.e., all employees in the industrial, commercial and institutional sector) as well as all other employees in a geographic area. In determining whether or not the applicant is entitled to be certified for such a bargaining unit, section 7 of the Act mandates that we assess the applicant's membership support among employees in the bargaining unit *at the time the application was made*. At the time the application was made, there were five employees in the bargaining unit, namely the five carpenters engaged in residential construction in Grey County. The applicant filed membership evidence on behalf of four of these employees.

11. In these circumstances, we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 16, 1980, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. There was filed a statement of desire in opposition to the application. However, none of the individuals signing the statement were employed in the bargaining unit on the date of the making of the application, and accordingly the statement cannot affect the applicant's right to certification.

13. Section 131a(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas. [emphasis added]

Therefore, pursuant to section 131a(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

14. Further, pursuant to section 131a(2) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the County of Grey, excluding the industrial, commercial and institutional

sector, save and except non-working foremen and persons above the rank of non-working foreman.

DECISION OF BOARD MEMBER JAMES A. RONSON:

1. Since there are no submissions by the respondent company in opposition to the cogent written submissions of the applicant union I will only say that I disagree with the reasoning of the majority that would allow a union to ask for a certificate for the industrial, commercial and institutional sector of the construction industry (the "I.C.I. sector") when there are no employees working in that sector. However, accepting (without agreeing) that the majority decision is correct in its interpretation of section 131a(1) of the Act and the union's entitlement to an I.C.I. certificate for the asking, there is the further question of what membership evidence the Board has to take into account to satisfy itself as required by section 131a(2).

2. The applicant seeks certification of (1) all carpenters and carpenters' apprentices in the employ of the respondent "who would be bound by a provincial agreement" (section 131a(1)) i.e., the I.C.I. sector of the construction industry; and (2) all carpenters and carpenters' apprentices in the employ of the respondent in Grey County with respect to *all other* sectors of the construction industry.

3. It would appear that, at the date of the application, there were no carpenters employed by the respondent in the I.C.I. sector of the construction industry. There were carpenters employed by the respondent in the residential sector of the construction industry in Grey County and elsewhere in the province. The membership evidence filed by the applicant relates only to those carpenters working in Grey County.

4. Section 131a(1) of the Act reads that: "... the unit of employees shall include *all employees who would be bound* by a provincial agreement together with all other employees in at least one appropriate geographic area" (emphasis added). Section 131a(2) directs the Board to issue two certificates, one confined to the I.C.I. sector and province-wide, and one confined to an appropriate geographic area, but for all other sectors of the construction industry. In my opinion, before the Board can issue a provincial certificate in the I.C.I. sector to the applicant, we must take into account the desire and intention of all carpenters in the respondent's employ in the construction industry. These are the employees "who would be bound" by a provincial agreement. These are the employees in the bargaining unit confined to the I.C.I. sector by separate certificate. As a result, those carpenters working outside Grey County must be given notice of, and be allowed to participate in the certification process.

5. At the very least, I would direct that the necessary administrative steps be taken to allow those carpenters and carpenters' apprentices working for the respondent outside Grey County to indicate their desire as to whether or not they wish the applicant to act as their bargaining agent with respect to work in the I.C.I. sector of the construction industry.

0444-80-R United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Cross Canada Equipment**, Cross Enterprises, Brad Cross, Cross Canada Service, Brad Cross Ltd., Sprucedale Texaco, Respondents

Construction Industry – Employee – Whether person hired for specific task at flat rate employee or sub-contractor

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and M. A. Ross.

APPEARANCES: *H. P. Rolph and W. Sherman for the applicant; B. Pollock for the respondents.*

DECISION OF THE BOARD; December 4, 1980

1. This is an application for certification filed pursuant to the construction industry provisions of *The Labour Relations Act*. By way of this application, the applicant is seeking to acquire bargaining rights for carpenters and carpenters' apprentices employed by the respondents. At issue is the question of whether Mr. Brad Cross or any of the other respondents, all of which appear to be controlled by Mr. Cross, employed any carpenters and carpenters' apprentices on the date of the making of the application. It is the applicant's contention that two individuals, namely, Mr. C. Larson and Mr. Z. Paanen were so employed.

2. A review of the report of a Labour Relations Officer appointed in this matter indicates that Mr. Larson is employed on a full-time basis by Boise Cascade in Kenora, but that from time to time he undertakes to perform certain outside work during his free time. Although Mr. Paanen did not attend before the Labour Relations Officer, it appears from the report that he is employed on a full-time basis by Peter Kooms Limited, but that at the relevant time had been given a week off by the company.

3. On or about May 21, 1980, Mr. Larson heard that Mr. Cross desired to have some work performed and went out to see him. Mr. Larson and Mr. Cross reached an agreement whereby Mr. Larson would build a wooden facade on the exterior of a service station owned by Mr. Cross and in return receive a flat sum for the work, irrespective of how long it took to complete. Mr. Cross supplied the construction materials. Mr. Larson arranged for Mr. Paanen, a friend of his, to assist him in the work. Mr. Larson paid Mr. Paanen directly. Mr. Larson and Mr. Paanen did not work any set hours on the service station job, but rather decided between themselves what days they would work and for how long. They were not supervised by Mr. Cross. When the work was completed, Mr. Larson received a cheque for the full agreed-upon price.

4. On these facts set out above, we are of the view that at the relevant time, neither Mr. Larson nor Mr. Paanen were employees of Mr. Cross or any of the other respondents. Rather, it appears that Mr. Larson was retained as a contractor and it was he who employed Mr. Paanen. It was not contended that either Mr. Larson or Mr. Paanen were "dependent contractors" of the respondents.

5. Having regard to the above, the Board is satisfied that the respondents did not

employ any carpenters and carpenters' apprentices on the date of the filing of the application. The application is accordingly dismissed.

0844-80-R United Plant Guard Workers of America, Local 1962,
Applicant, v. **General Motors of Canada Limited**, Respondent, v. Group
of Employees, Objectors

Membership Evidence – Certification – Objector alleging collector misrepresenting effect of signing cards – Misrepresentations cured at meeting – Single collector – Misrepresentations isolated – Whether membership evidence affected (Dissent of Board Member J.A. Ronson. Majority decision reported [1980] OLRB Rep. Oct. 1437.)

DECISION OF BOARD MEMBER JAMES A. RONSON: December 17, 1980

1. On or about July 18, 1980 the applicant union began an organizing campaign among the security guards at the company's South plant in Oshawa. There was talk that the employer was going to contract out its security service requirements. On July 21, 1980 the union filed membership cards for 70 guards out of a total of 78 in the proposed bargaining unit.

2. All of the cards submitted as evidence in support of this application were collected by Mr. Dillon, a security guard at the plant. The Board heard uncontradicted evidence that:

(1) At a meeting attended by at least 16 to 20 employees at the Villa Restaurant on July 18th, Dillon told Vincent Vasey that "(The application) has to go to a vote, irregardless". Mr. Vasey signed a card at this meeting but could not recall if it was before or after hearing this statement. At a meeting on July 27th, shortly before the termination date for this application, Vasey learned that there would be no vote. He filed a statement of desire with the Board the next day. Given the union evidence that Mr. Vasey was very upset on July 27th upon learning there would be no vote, it is probable that he signed his card after hearing Dillon's misrepresentation.

(2) On July 19th, Gary Cooper and two other employees met with Dillon in the cafeteria at the plant. Mr. Dillon told them "that there would be a vote on it at some later date". All three men signed cards at this time. Mr. Cooper also learned on July 27th there would be no vote and he filed a statement of desire with the Board;

(3) At a meeting at Dillon's house on July 20th, John Gorman asked Dillon if there would be a vote. Mr. Dillon replied "that unless we get 100% signed up there will be a vote". Mr. Gorman said he felt sure that not all the guards would sign cards and therefore a vote would take place. He signed a card. (At the hearing, after Vasey and Cooper had testified,

Gorman stood up and asked to be allowed to testify as to what Dillon had told him. The Board allowed him to give his evidence.)

3. Mr. Dillon did not attend the hearing. No one disputed the information that he was ill and in hospital. The Board was prepared to entertain an application by the union for an adjournment so as to allow Dillon to give evidence. The union decided to proceed with its application.

4. The union led evidence through three witnesses. Mr. Kenneth Wood overheard a discussion between Dillon and another guard wherein the guard asked Dillon if there would be a vote. Dillon's reply was that there would be no vote if the union had between 50% and 60% support. Mr. Wood also heard Dillon say the same thing at various times during the campaign. Mr. Frank Geypens assisted Dillon during the campaign. He stated that he never heard Dillon say anything about a vote. Mr. Watson Cook, the president of the applicant union, stated that he explained the certification procedure to Dillon several times and that Dillon "knew what the percentages were". Mr. Wood told Dillon "we would need quite a bit over 55% because of the past history of G.M. with petitions". Apparently, six years ago, the applicant union lost a vote at the plant after filing cards indicating 65% of the guards wanted the union.

5. The misrepresentation that a signed card can lead only to a vote is particularly beguiling to the employee who is of mixed mind about the union or who does not want the union but also does not wish a falling out with his or her fellow employees. To the former a secret vote means more time to make up his or her mind. To the latter it means the chance to express his or her true wishes in secret without incurring the displeasure of anyone. In the circumstances all the card means is that the employee desires a vote so that his true wishes can be made known in secret.

6. The Board's concern over the integrity of membership evidence is concisely stated in *Intercraft Industries of Canada Ltd.*, [1979] OLRB Rep. Jan. 39:

6. The certification process has been designed to protect the secrecy of the employee's selection and at the same time to minimize disruption of the employer's operation. The Board relies on the documentary evidence submitted by the trade union and does not call before it each and every employee in the bargaining unit for purpose of hearing oral testimony as to their true wishes. The Board relies on documentary hearsay evidence and must therefore, be circumspect in its acceptance of this evidence if it is to protect the integrity of the certification process and thereby facilitate the bargaining process which follows the issuance of a Board certificate.

Once an irregularity becomes apparent the Board has to determine the extent to which doubt is cast upon the membership evidence in total. In *Reliance Electric*, [1979] OLRB Rep. Nov. 1107, which dealt with an intimidating statement, the Board said:

... if there is evidence that an employee who approached employees with cards and acted as a collector utilized such a threat, it would be reasonable to discount all of the cards for which that individual acted as collector.

7. In view of the uncontradicted evidence of Vasey, Cooper and Gorman the best that can be said of the union's evidence is that Dillon deliberately misled employees when necessary in order to obtain their card. Can the Board, in these circumstances, infer that only 3 employees out of 70 needed persuasion to sign cards and that the misrepresentations were isolated occurrences? I think not. Nor can the Board conclude that all those employees who were misled learned of the true state of affairs at the meeting on July 27th, 6 days after the cards were filed with the Board and 4 days before the termination date.

8. The majority decision in this case adopts a "preponderance of evidence" test that is dependent on a number of employees who come forward to the Board, to testify that they were misled into signing a card, and reveal their true feelings about the union. Given the siren effect of the misrepresentation and the desire of employees to use a vote as a shield against repercussions, it is unrealistic for the Board to expect all wronged employees to come forward voluntarily. I would also add that the Board does not impose this test of preponderance on a union that seeks to contest the voluntariness of a statement of desire.

9. Since Dillon collected all the cards, I am not satisfied that there is sufficient voluntary evidence to grant outright certification. His actions have tainted or cast a cloud over all the membership evidence. I would order a vote.

1491-80-R Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (AFL-CIO-CLC), Applicant, v. Burlington Post and Weekend Post, Divisions of **Inland Publishing Co. Limited**, Respondent.

Membership Evidence – Name of applicant differing from name on membership evidence filed – Whether Board amending name of applicant under section 93

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and W. G. Donnelly.

APPEARANCES: *H. Goldblatt and L. Torney for the applicant; Edward T. McDermott, D. A. Poitras and R. L. Singleton for the respondent.*

DECISION OF THE BOARD; December 4, 1980

1. The name: "Burlington Post and Weekend Post Published by Inland Publishing Company Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Burlington Post and Weekend Post, Divisions of Inland Publishing Co. Limited".

2. The applicant was notified by the Registrar that it appeared that the Board had not found in any previous proceeding that the applicant had been found to be a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* under the name "Southern Ontario Newspaper Guild". In these circumstances, the applicant was advised by the Registrar

that it must be prepared to satisfy the Board at the hearing that it was a trade union within the meaning of section 1(1)(n) of the Act.

3. At the hearing the Board informed the parties that there was on file with the Board a certificate on status of trade union under the signature of the Registrar which indicated that the Board had previously found that "Newspaper Guild, Local 87" was a trade union within the meaning of section 1(1)(n) of the Act. The Board also announced at the hearing that the evidence of membership filed by the applicant was in the form of combination applications for membership and receipts in "Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO)". The applicant requested that the name of the applicant appearing in the style of cause of this application as "Southern Ontario Newspaper Guild" be amended to read "Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (AFL-CIO-CLC)". The applicant referred the Board to an earlier decision where the Board had found that the "Toronto Newspaper Guild Local 87, The Newspaper Guild" was a trade union within the meaning of section 1(1)(n) of the Act. The Board confirms that in *The Brantford Expositor, A Division of Southam Press (Ontario) Ltd.* case, Board File No. 1112-78-R, unreported decision dated October 24, 1978, the "Toronto Newspaper Guild Local 87, The Newspaper Guild" was found by the Board to be a trade union within the meaning of section 1(1)(n) of the Act.

4. The evidence established that in 1977 the Toronto Newspaper Guild Local 87, The Newspaper Guild (CLC-AFL-CIO) decided to change its name to Southern Ontario Newspaper Guild. This decision was contemplated in order to reflect the expansion of the Toronto Newspaper Guild Local 87, The Newspaper Guild (CLC-AFL-CIO) ("Local 87") into adjacent areas of southern Ontario. The notice for the Annual Meeting of Local 87 reminded its membership of the necessity of a quorum so that its business could be done and advised that the agenda would include:

Notice of Motion: "That the Executive recommended to the membership that Toronto Newspaper Guild change its name to Southern Ontario Newspaper Guild".

The annual general meeting was held May 10, 1978, and the Board finds on the basis of the evidence before it that a quorum existed at that meeting. A motion before that meeting that "Toronto Newspaper Guild change its name to Southern Ontario Newspaper Guild" was adopted.

5. Local 87 then sought and obtained the approval of the international executive board of The Newspaper Guild under the constitution of The Newspaper Guild for the change in name referred to in paragraph 4. This change in name apparently became effective in July of 1978 and this information was communicated to the Board, other Canadian locals of The Newspaper Guild and to employers which had collective agreements with Local 87. Having regard to the evidence and representations before it, the Board is satisfied that Local 87 changed its name from "Toronto Newspaper Guild Local 87, The Newspaper Guild (CLC-AFL-CIO)" to "Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (AFL-CIO-CLC)". The Board finds that "Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (AFL-CIO-CLC)" is a trade union within the meaning of section 1(1)(n) of the Act.

6. The name of the applicant appearing in the style of cause of this application is "Southern Ontario Newspaper Guild". Having regard to the evidence before it, the Board is satisfied that a *bona fide* mistake has been made with the result that the proper person or trade union has not been named as a party or has been incorrectly named within the meaning of section 93 of the Act. Having regard to the name of the applicant appearing on the evidence of membership, the Board is satisfied that the employees affected by this application are aware of the correct name of the applicant. In these circumstances the name of the applicant appearing in the style of cause of this application as "Southern Ontario Newspaper Guild" is amended to read "Southern Ontario Newspaper Guild Local 87, Newspaper Guild (AFL-CIO-CLC)".

• • •

10. Accordingly, the Board certifies the applicant under the provisions of section 6(1a) of the said Act as the bargaining agent for all employees in the editorial department of the respondent in Burlington, save and except the publisher, editor, sports editor, community editor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period pending the final resolution of the composition of the bargaining unit.

1607-80-R The International Ladies Garment Workers Union,
Applicant, v. **Josh Industries Incorporated**, Respondent, v. Group of
Employees, Objectors.

Certification – Practice and Procedure – Impropriety by collector alleged at examiner meeting – Whether Board conducting its own inquiry – Whether Board allowing employee time to particularize allegation

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *S. B. D. Wahl and L. Goguen for the applicant; Donald J. McKillop, Q.C., M. Mandel, and S. Himelfarb for the respondent; Adelina Discola, Anna Lazaratos and Leona MacNeil for the objectors.*

DECISION OF R.D. HOWE, VICE-CHAIRMAN AND BOARD MEMBER F.W. MURRAY; December 5, 1980

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons, above the rank of supervisor, office and sales staff, designers, sample and pattern makers, persons regularly employed for not more than twenty-four hours per week and students

employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In accordance with the Rules of Practice respecting applications for certification, the respondent employer has filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list. Having regard to the list filed by the employer, and the agreement of the parties with respect to the bargaining unit description, the Board is satisfied that there are fifty-four employees in the unit.

5. In support of its application for certification, the applicant trade union filed documentary evidence of membership in the form of cards, which consist of a combination application for membership and an attached receipt. The union filed forty-six cards, thirty-seven of which coincide with the names of employees in the agreed unit. The membership cards are signed by the employees, and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date for this application. The money was collected by more than one collector and the membership evidence is supported by a duly completed Form 8 Statutory Declaration Concerning Membership Documents. Thus, the documentary evidence of membership filed by the applicant indicates that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 7, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. In addition to the applicant's documentary evidence of membership, there was also filed with the board a statement of desire purportedly signed by a number of employees in the bargaining unit, in opposition to the application. The Board generally takes such a statement of desire into account in deciding whether to exercise its discretion under section 7(2) of the Act to order a representation vote notwithstanding documentary evidence of membership which demonstrates that more than fifty-five per cent of the employees in the bargaining unit are "members" within the meaning of section 1(1)(j) of the Act. In this case, however, even if the statement of desire is entirely voluntary, the applicant will still have the unequivocal membership support of more than fifty-five per cent of the employees in the bargaining unit. Thus, the statement of desire could not affect the result in this case. Accordingly, it was unnecessary to undertake the inquiry (into the origination of the statement of desire and the manner in which each signature on it was obtained) contemplated by Rule 48 of the Rules of Procedure.

7. There were also filed with the Board revocations purportedly signed by two employees who had previously signed the aforementioned statement of desire, by which the two signatories purported to draw their signatures from the statement of desire. However, since the statement of desire could not affect the result in this case, it was unnecessary for the Board to consider the revocations.

8. Prior to the hearing of this application on November 21, 1980 Board Officer C. Wheatley met with the parties in an attempt to resolve all issues in dispute. After the parties had agreed upon the aforementioned bargaining unit description, Mr. Wheatley provided them with the information set forth above and advised them that it appeared, subject to the Board's normal second check, that a certificate would issue. He then asked the parties if they

felt the necessity to appear before a panel of the Board to make any further representations with respect to this application and received a negative response. However, as the parties were in the process of leaving the room, A. Discola, one of the objectors said: "Who won?" (or words to that effect). Mr Wheatley repeated that it appeared that the applicant would be certified. Ms. Discola then asked: "Does that mean that now I won't be able to work there?" When Mr. Wheatley and counsel for the applicant assured her that she would not be precluded from working for the respondent by the certification of the applicant, Ms. Discola pointed at Rona F. Moreau, the person who signed the Form 8 declaration (on which she is identified as being the "organizer" of the applicant) and stated that Ms. Moreau had told her that she would not be permitted to work there unless she joined the union. At that point, Mr. Wheatley advised the parties that a hearing would be convened before a panel of the Board.

9. When the parties appeared before this panel of the Board, they related what had occurred at the meeting with Board Officer Wheatley and then made their submissions with respect to the acting which should be taken by the Board.

10. Counsel for the respondent, after noting that he was not making any allegations of misconduct on behalf of his client, submitted that the Board should either appoint a Board Officer to investigate the circumstances surrounding the signing of the membership cards submitted in support of this application, or exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken.

11. Ms. Discola, who was not represented by counsel, also made submissions to the Board. Unfortunately, the absence of an Italian translator made it somewhat difficult for the Board to completely understand all of her submissions. Many of her submissions appeared to relate to what she considers to be the undesirable effects which the union organizing campaign has allegedly had upon the interpersonal relationships among employees in the plant. However, as the Board attempted to explain at the hearing, we do not in any event take such matters into account in deciding certification applications. Ms. Discola did not make any specific submissions concerning the action which the Board should take in view of the statement allegedly made to her by Ms. Moreau other than the contention (implicit in her submissions) that the application should be dismissed.

12. Counsel for the applicant submitted that the Board should not consider any potential allegations by Ms. Discola since she had failed to comply with the provisions of Rule 47 with respect to particulars of alleged misconduct. He referred to a number of Board decisions and contended that the Board jurisprudence clearly indicates that Rule 47 is to be interpreted very strictly in certification cases. It was his position that the applicant would be substantially prejudiced in collective bargaining by the delay which would result from the particularization and hearing of Ms. Discola's allegations. He contended that any such delay would inevitably erode employee support for the trade union to the detriment of the applicant. It was also his position that if there was any doubt concerning the membership evidence, it was incumbent upon the respondent and the objectors to make all reasonable inquiries in an expeditious manner to determine if there were any improprieties. Accordingly, he submitted that the Board "must dismiss any potential allegations" and issue a certificate to the applicant.

13. In response to those submissions, counsel for the respondent contended that the present case is distinguishable from the jurisprudence cited by counsel for the applicant on the basis that no charges or allegations had been made herein by any party. He contrasted a

situation involving charges or allegations with the present situation in which what is before the Board is information provided spontaneously by an objecting employee to a Board Officer engaged in an attempt to resolve matters in dispute among the parties without a formal hearing before a panel of the Board. He further contended that section 50 might be applicable if Ms. Moreau did in fact make the statement attributed to her, since obtaining a certificate on the basis of her Form 8 declaration would, in his submission, be tantamount to a fraud upon the Board.

14. It is the well known practice of the Board to conduct its own investigation into allegations of non-sign or non-pay, i.e. into charges that an employee has not signed an application for membership in the trade union or has not paid any money on its own account in respect of initiation fees (see *International Nickel Company of Canada Limited*, 65 CLLC ¶16,066). In such cases, the Board appoints a Board Officer to question those involved. The Board Officer interviews the employee (or employees) involved and obtains a signed statement. The Board's initial investigation is carried out in that manner so as to maintain the secrecy of the membership evidence in accordance with the policy set forth in section 100 of the Act (see *Remington Rand Limited*, 63 CLLC ¶16,288). If the inquiry by the Board Officer does not indicate that a non-sign or non-pay has occurred, the Board does not proceed further. However, if the inquiry does indicate such irregularity, the Board will schedule a hearing and subpoena witnesses, including the Form 8 declarant. At the hearing, the Board examines the witnesses in the first instance and then makes them available to the other parties for cross-examination (see *Suburban Lathing & Accoustics Limited*, [1965] OLRB Rep. Apr. 17).

15. In the *Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611, the Board stated, at page 625:

"32. It should be noted that the Board will not undertake an inquiry of its own in the absence of charges alleging defective membership evidence. Further, it is well known the Board will only undertake its own inquiry when the allegations involve non-pay or non-sign — situations that immediately suggest a potential fraud upon the Board. Such conduct, if proven, is viewed as so contrary to the Board's processes that the Board will undertake its own inquiry at any time. (See *Alcan Colony* [1963] OLRB Rep. June 159; *Acu Forming*, [1970] OLRB Rep. July 480.) And in such inquiries the Board will subpoena the Form 8 declarant in order to ascertain why such improper activity was not revealed. *On the other hand, charges of undue influence or misrepresentation must be alleged and proven by the party making the charge.* (See *Alcan Colony*, *supra*.)" [emphasis added]

The Board also noted in the *Kendall* case that other defects in membership evidence which raise questions about the accuracy of Form 8 (such as an allegation of "indirect pay", i.e. an allegation that the initiation fee was collected on behalf of the trade union by a person other than the individual whose name appears as a collector on the card), may also prompt the Board to conduct its own inquiry; at pages 625 and 626, the Board stated:

".... The issue of when the Board will conduct its own inquiry in the face of evidence or allegations raising these other 'irregularities' exclusively has been dealt with on a case by case basis and no general rule is possible.

However, one important factor in the determination is the apparent extent of the irregularity.”

16. Having regard to the representations of the parties, the Board is of the view that this is not an appropriate case in which to appoint a Board Officer. The information provided to Board Officer Wheatley by Ms. Discola in the present case does not raise questions about the accuracy of the Form 8 signed by Ms. Moreau, which reads as follows:

“I, RONA F. MOREAU, the ORGANIZER of the applicant herein declare that, to the best of my knowledge, information and belief:

1. The documents submitted in support of the application represent documentary evidence of membership on behalf of 46 persons who were employees of the respondent in the bargaining unit that the applicant herein claims to be appropriate for collective bargaining, on the date of the making of the application.
2. There were approximately 60 persons who were employees of the respondent in the bargaining unit that the applicant herein claims to be appropriate for collective bargaining on the date of the making of the application.
3. (*Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.*) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

[no exceptions]

Dated at Toronto, this 7th day of November, 1980.

(signed) R. Moreau”

Ms. Discola’s information does not constitute an allegation of potential fraud as is present in the non-sign and non-pay cases; rather it is information concerning alleged intimidation or coercion of the type which must be proved by the party making the allegation (see 229704 *Contracting Limited*, [1971] OLRB Rep. June 337). Accordingly, the Board is of the view that this is not an appropriate case in which to appoint a Board Officer to investigate the circumstances surrounding the signing of the membership cards.

17. The Board is also of the view that it would not be appropriate to exercise its discretion to direct a representation vote under section 7(2) on the basis of the aforementioned

unsworn and nonparticularized representation made by Ms. Discola with respect to the words alleged to have been spoken by Ms. Moreau. Nevertheless, the Board must determine whether it would be appropriate to afford Ms. Discola an opportunity to particularize and attempt to prove before the Board her aforementioned allegation. That determination requires consideration of the Board jurisprudence concerning the application of Rule 47 in the context of allegations of intimidation or coercion in the obtaining of membership evidence.

18. Rule 47 provides, in part, as follows:

“47.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

....

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.”

19. In *Fleck Manufacturing Limited*, 62 CLLC ¶16,236, the Board was presented with a situation somewhat similar to the instant case. That decision contains the following passage (at page 1047 of CLLC Vol. 2):

“At the hearing, counsel for the objectors indicated without particularizing the nature thereof, that he wished to make certain allegations

of impropriety against the union concerning the manner in which the union had obtained the applications and receipts which it filed in this case. Up to the time of the hearing on January 25th, however, no notice as required by section 48 of the Board's Rules of Procedure had been filed on behalf of the objectors of any intention to allege improper or irregular conduct on the part of the union. Counsel admitted that the information upon which he proposed to base these allegations had come to his knowledge as early as January 16. His only explanation for his failure to give timely notice and particulars of these allegations was that he was not familiar with section 48 of the Board's Rules of Procedure. The relevant parts of this section read as follows:-

48.-(1) Where, at the hearing of an application other than an application,

- (a) for a declaration that strike or lockout is unlawful; or
- (b) for consent to institute a prosecution,

a person intends to allege improper or irregular conduct by any person, he shall file a notice of such intention which shall contain a concise statement of the material facts upon which he intends to rely in support of the allegation but not the evidence by which the material facts are to be proved.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the conduct alleged, he shall not, without the consent of the Board upon such terms and conditions as the Board thinks advisable, adduce evidence at the hearing of the application of such facts.

It is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. The object of this requirement, which finds expression in section 48 of the rules, is obviously to expedite and facilitate the hearing and processing of applications under the Act and to avoid prejudice, delay or embarrassment to the parties involved. Delayed and last-minute allegations, which lead to adjournments or cause prejudice, embarrassment or unnecessary expense to the other parties, and which with reasonable diligence could have been made at a more timely stage of the proceedings will not be entertained except for good and sufficient cause.

Having regard to the untimely nature of the allegations, and the reason given for not advancing them earlier, and to the fact that copies of the Board's Rules of Procedure containing section 48 are circulated to the public and are readily available to counsel, and to the obvious and unnecessary prejudice which would inevitably have resulted to the

applicant if such allegations had been allowed for the first time at the hearing, the Board ruled that it would not entertain them. Indeed, it is to be observed that the Registrar of the Board sent a copy of the Board's Rules of Procedure to counsel for the objectors on January 17th."

By way of contrast, Ms. Discola was not represented by counsel in the present case and there is no indication that she had access to the Board's Rules of Procedures. Although the green sheet (Form 5) alerts employees to a number of the Board's requirements with respect to statements of desire, it does not notify them of the need to promptly file duly particularized allegations of improper or irregular conduct. While ignorance of the law is not a defense to misconduct, it may nevertheless be a relevant matter for the Board to consider in exercising its discretion under Rule 47 where a party appearing before the Board is a lay person who appears to have earnestly attempted to duly comply with all of the procedures of which she had notice prior to the hearing.

20. The purpose of Rule 47 were explained by the Board as follows in *Trigiani Contracting Limited*, [1979] OLRB Rep. Feb. 141:

"7. That section has a twofold purpose grounded in both legal considerations and in industrial relations considerations. The legal consideration implicit in section 47 of the Board's Rules of Procedure is a recognition of the rule of natural justice that anyone charged with wrongdoing should have sufficient notice of the charge against him. The labour relations consideration is a recognition that the realities of union organization are such that a delay of Board proceedings may serve to defeat the union. A union may successfully defend charges made against it only to discover, upon the late granting of a certificate, that its support among the employees has substantially eroded because, for reasons often not fully understood by rank and file employees, it has failed to get certified promptly and commence immediately to bargain on their behalf. For that reason section 47 of the Board's Rules of Procedures seeks to strike a balance between natural justice and the avoidance of delay in certification proceedings or any other proceedings before the Board. In an application for certification both the interests of natural justice and industrial relations are best served when allegations of wrongdoing are made in sufficient time and with sufficient particularity that an application union is not prejudiced either by surprise or by being forced to seek adjournment and the delay of its own application. Therefore, where allegations against an applicant are not filed in a timely manner or with sufficient particularity the Board may refuse to entertain them. (*Fleck Manufacturing Limited* 62 CLLC ¶ 16,236; *Cable Tech Wire Company Limited* (as yet unreported) Board File No. 0297-78-R, June 21, 1978)."

However, that case also involved an attempt by *counsel* to file untimely charges (as did the *Cable Tech Wire* case referred to therein).

21. The Board has reviewed each of the cases cited by counsel for the applicant as well as a number of other cases concerning Rule 47. None of those cases appears to be on all fours with the instant case in which an employee, who has some difficulty with the English language,

appeared before the Board in support of a statement of desire without assistance of counsel and apprised the Board of an alleged impropriety by the Form 8 declarant (identified therein as the "organizer" of the applicant) who is the collector on twenty-one of the forty-six cards submitted by the applicant in support of the application. (Sixteen of the names on the said twenty-one cards coincide with names on the list of employees in the bargaining unit.) It should also be noted that Ms. Moreau is apparently not an employee of the respondent (as her name is not included on the list of employees submitted by the respondent). Thus, the case involves alleged misconduct by a person who may well have been perceived to have been an official or representative of the applicant.

22. Having regard to all of the circumstances, the Board is of the opinion that this is an appropriate case in which to exercise its discretion under Rule 47 in such manner as to afford Ms. Discola an opportunity to particularize her allegation and adduce evidence before the Board (with the assistance of a translator) in support of such allegation if she wishes to do so. Although the Board is sensitive to the possible prejudice which the applicant may suffer through the effluxion of time as a result of this disposition of the matter, the Board has weighed that interest against the interest of ensuring that the documentary evidence of membership upon which the Board is asked to rely as a basis for granting bargaining rights to the applicant, reflects the true wishes of the employees who signed them and was not procured by use of intimidation or threats proscribed by section 61 of the Act. The Board is of the view that the proper balancing of those two legitimate interests in the circumstances of this case supports the conclusion that Ms. Discola should be afforded such opportunity.

23. Accordingly, if Ms. Discola files with the Board on or before Wednesday, December 17, 1980 a notice of intention which contains a concise statement of the material facts upon which she intends to rely including the time when and the place where Ms. Moreau is alleged to have spoken the words in question, the Registrar is directed to list this matter for further hearing for the purpose of hearing (with the assistance of an Italian translator) the evidence and submissions of the parties with respect to the aforementioned allegation. Otherwise, the Board will dispose of this application on the basis of the material presently before it.

24. This matter is referred to the Registrar.

DISSENT OF BOARD MEMBER O. HODGES:

1. In the circumstances of this case natural justice requires a balancing of the parties' interests. On the one hand the objector may be entitled to have her allegation of coercive statements by the union investigated by the Board; on the other hand the interests of two-thirds of the employees in the agreed upon bargaining unit who have chosen the union to be their bargaining agent will suffer because bargaining to make a collective agreement with their employer will be delayed if an additional hearing is held.

2. The allegation of the coercive statement made to the objector by the signatory to the Form 8 came only after the Labour Relations Officer had met with the parties and indicated that the union would probably be certified. There are three possibilities why the objector did not complain earlier:

- (1) The objector may not have mentioned the incident before because the alleged threat (that she would not be able to keep her job unless

she joined the union) did not appear serious until it became apparent (as it did at this point) that the union would be certified.

- (2) She may have been uncertain as to when she should speak during the meeting with the Board Officer.
- (3) It could also be that the allegation at the last minute was part of a scheme to delay certification and so to undermine support for the union during bargaining.

3. There is further doubt cast upon the alleged threat because of the language difficulty. The objector's problem with English was evident at the Board hearing. What was the language spoken when the objector says she was told she could not work unless she joined the union and in what context was the alleged remark made? Obviously it would not be improper to explain the effect of a union shop upon employees who refuse to comply with the requirements of a union shop agreement, or the effect of a refusal to pay dues as required by law.

4. It is to be noted that the objector did not sign a union membership card, nor was she one of the first to sign the statement of desire. Her name appears as number 14 on the list of seventeen names filed in opposition to the union, only two of which had signed union cards. At the hearing in this matter the objector herein referred to, Adelina Discola, made her opposition to the union very clear and expressed her concern for the problems she saw for the management of the business if the union were certified. It is also very significant that no complaint was made by any person who had signed a union card.

5. In my opinion the objector Discola complained without sufficient grounds to cause a delay in certification proceedings. Any employee who signed a union card could have written to the Board or attended at the hearing if they felt in any way intimidated by the union. None did so.

6. The applicant union is one of the most experienced in organizational protocol. It is unthinkable that one of their organizers would threaten a worker in any way whatsoever. The statements made by Discola at the hearing of the Board satisfy me that her language difficulty and her clear management orientation are the basis for her objection, and nothing more.

7. In all of the circumstances of this case and in consideration of the testimony and statements made at the Board hearing, I would certify the union without further delay so that collective bargaining could proceed in the interest of all of the employees including the objector Discola.

1993-80-U; 1994-80-U Maitland Redi-Mix Concrete Products Limited,
Applicant, v. Leonard Schultz, Matt Elliott and Teamsters Local Union
879, affiliated with the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America, Respondents.

Construction Industry – Strike – Whether concrete supplier employer in construction
industry – Whether non-construction employer having status to bring section 123 application as
“interested person” – Threats to establish picket line – No strike occurring as of hearing – Whether
Board will grant *quia timet* relief

BEFORE: R.A. Furness, Vice-Chairman.

APPEARANCES: *James E. Bowden and Roland Kaufman for the applicant; Ken Petryshen,
Len Shultz and Matt Elliot for the respondents.*

DECISION OF THE BOARD; December 15, 1980

1. The applicant has filed two identical applications for relief under section 123 and
section 82 of *The Labour Relations Act*.

2. None of the parties called evidence before the Board. The facts before the Board
were in the form of the following agreed statement of facts:

A number of statements were made by the respondents Schultz and
Elliott that picket lines would be set up at the Union Carbide Canada
Limited plant at Highway 9 just south of Walkerton on the east side of
the road (the “site”). These statements were made to Messrs. Nousiainen
and Mitchison who are officials of the general contractor, Harbridge and
Cross Limited. All of the people at the site are covered by collective
agreements or at least are not in a position to engage in a lawful strike. If
any picket line was to be honoured, those honouring the picket line
would be engaged in an unlawful strike. The applicant supplies and
delivers ready-mix concrete to the site. On December 8, 1980, Schultz
spoke to Nousiainen and said he was going to put up a picket line “now”.
That was the most recent incident. There are no members of the respon-
dent trade union on the site. Schultz and Elliott are officials of the
respondent trade union. The applicant is supplying concrete to Har-
birdge and Cross Limited at the site pursuant to a contract.

3. Sections 123 and 82 of the Act provides:

123(1) Where on the complaint of an interested person, trade union,
council of trade unions or employers’ organization the Board is satisfied
that a trade union or council of trade unions called or authorized or
threatened to call or authorize an unlawful strike or that an officer,
official or agent of a trade union or council of trade unions counselled or
procured or supported or encouraged an unlawful strike or threatened an
unlawful strike, or that employees engaged in or threatened to engage in

an unlawful strike, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

(2) Where on the complaint of an interested person, trade union, council of trade unions or employers' organization the Board is satisfied that an employer or employers' organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers' organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.

(3) The Board shall file in the office of the Registrar of the Supreme Court a copy of a direction made under this section, exclusive of the reasons therefor, in the prescribed form, whereupon the direction shall be entered in the same way as a judgment or order of that court and is enforceable as such.

82. Where, on the complaint of a trade union, council or trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

4. The applicant argued that if a person threatens to put up a picket line there must be some intention behind these threats. The applicant pointed out that since the respondents are not involved on the site it could only surmise on the rationale for making such threats. The applicant further argued that the setting up of a picket line and the honouring of it by employees would be violations of sections 65 and 67 of the Act. The applicant stressed that there had been a series of threats and that it was reasonable to believe that a picket line would be set up. The applicant argued that it ought not to have to wait until a picket line was set up before relief is granted.

5. The respondents argued that since the applicant is not an employer in the construction industry it could not seek relief under the provisions of section 123. The respondents also argued that the applicant was not entitled to relief under section 82 because of the circumstances of this application and also because that section was designed to allow

employers to deal with unlawful activity by their own employees. In the alternative, the respondents argued that if the applicant could make an application under sections 82 or 123, the conduct involved in the application did not entitle the applicant to a remedy.

6. The applicant is engaged in the delivery of ready-mix concrete to the site of construction. The Board has determined on many occasions that an employer which merely delivers material to a site of construction is not an employer within the meaning of section 106(c) of the Act. See, for example, the *Ethier Sand & Gravel Limited* case, [1979] OLRB Rep. Oct. 962 and the *Canadian Road Asphalts Limited*, case, [1980] OLRB Rep. March, 299. On the facts before it, the Board finds that the applicant is not an employer within the meaning of section 106(c) of the Act. However, the question of whether the applicant may seek relief under the provisions of section 123 is not answered by such a determination. The applicant may be an interested person within the meaning of section 123 and hence, may be able to seek relief under that section. A clear determination of whether the applicant may seek relief under section 123 is neither possible nor necessary in the context of this application. Such a determination is not necessary for reasons which subsequently appear in this decision. Such a determination is difficult in the context of this decision because none of the parties made any representations on whether the respondent trade union is a trade union within the meaning of section 106(f) of the Act. In addition, there is no indication of whether any employees who might be affected by this application would or would not be employees within the meaning of section 106(b).

7. The respondents have urged on the Board a very narrow interpretation of section 82. That section does not restrict relief under its provisions to the conduct of an applicant's own employees or with respect to conduct which affects an applicant's own employees. The Board finds that the applicant may seek relief under the provisions of section 82. Of course, whether the applicant is entitled to relief depends upon the facts before the Board.

8. The applicant's request for relief is based upon statements by Leonard Schultz and Matt Elliott that a picket line would be set up. Such a picket line in fact was never set up by anyone at any time. The applicant argues that there must be some intentions behind these threats (referred to as "statements" in the agreed statement of facts) and that the honouring of a picket line by employees would be violations of sections 65 and 67.

9. The Board was referred to two decisions with respect to applications for relief under section 123 where picketing had occurred. In the *North Simcoe Electrical Contracting Limited* case, [1973] OLRB Rep. June 336, the Board in refusing to grant relief under section 123 stated:

Based on the evidence it is apparent in this particular situation the applicant has not suffered any harm. There is no indication that its employees have refused to come to work and there is no indication that the pickets have resulted in economic pressure being brought to bear on the applicant which is harmful to its interests. CLAC has not demonstrated that either it, as a union, or any of the employees that it represents have suffered any particular economic harm. Other persons or contractors on the project have not appeared as interested persons seeking relief and they do not complain about the activity. It may very well be that they have taken other proceedings if they have been adversely affected or

alternatively they may not have been affected – but in view of the nature of the evidence we are not prepared to speculate as to their position.

13. Insofar as the activity of the trade union and its members is concerned it is being done peacefully and without violence, and if any harm was caused it appears to have abated on the Tuesday. By Wednesday the activity of the trade union was obviously resulting in no harm whatsoever to any person. The fact of the matter is that persons who may have been members of other trade unions were crossing picket lines which belies a view held by many persons that members of trade unions will not cross picket lines. When this application was made all the picketing had ceased. Further, there was no existing unlawful strike nor in view of the return to work of the employees on the project are we convinced that there is the threat of an unlawful strike within the meaning of Section 123.

In the *Valentine Developments and Forto Forming Limited* case, [1973] OLRB Rep. Oct. 537, an official of a trade union had stated that he “would blanket the area with pickets even if it costs a million dollars” and that he “would get the support of the Hamilton District Trades Council”. These statements were made to representatives of the applicants and occurred in the context of which of two trade unions should be doing form work on a construction site. The alleged threat of an unlawful strike occurred at a time when the application of a pour of concrete could have resulted in serious economic consequences to Valentine Developments. In that case the Board asked whether there was a real threat to set up a picket line on the work site, and if so, did such a threat in the circumstances involve one of unlawful strike. The Board concluded that in the particular circumstances of that case the threat of an official of a trade union to set up a picket line was a threat of an unlawful strike. The Board made a direction that the respondents cease and desist from threatening to call or authorize an unlawful strike.

10. In the instant application there was no evidence to support from other trade unions and no threat of a strike as such. In the instant application there were statements made that a picket line would be set up. A picket line was not set up and the applicant has suffered no harm. In fact, these statements were not even made to the applicant. There is nothing before the Board to indicate whether the proposed picket line would block the entrance to the site or would merely be an informational picket line. In addition, there is nothing to indicate where any future picket line would be established. Even if a picket line had been established, there is, as was pointed out in the *North Simcoe* case, *supra*, no certainty that an unlawful strike would occur.

11. The distinction between the *Valentine Developments* case, *supra*, and the *North Simcoe* case, *supra*, lies in the perception of the Board of what would probably happen in the former case as opposed to what had not happened in the *North Simcoe* case. In the *North Simcoe* case, a picket line which had not caused an unlawful strike had been removed by the time the application had been made. In the instant application, after a series of statements, a picket line has not been established, no one has engaged in an unlawful strike and the applicant has not suffered any harm. The application for relief is, in the Board's view, premature and may be compared to a request for an injunction *quia timet* before the courts. Injunctions *quia timet* are not granted by the courts unless a plaintiff shows a strong case that the apprehended mischief will in fact arise, see *Cheeseworth v. Toronto* (1921), 49 O.L.R. 68 and *Matthew v.*

Guardian Assurance Company (1919), 58 S.C.R. 47, and that the mischief, when it comes, will be very substantial, see *Fletcher v. Bailey* (1885), 28 Ch. D. 688. In the instant application, the conduct of the respondents has not violated the provisions of sections 65 and 67 and the applicant is not entitled to relief under the provisions of section 82 or section 123.

12. Statements by the respondents that a picket line would be set up do not persuade the Board that an unlawful strike will occur at the site. The mere apprehension by the applicant that a picket line might be set up which in turn might lead to an unlawful strike is not sufficient, on the facts before the Board, to entitle the applicant to the granting of discretionary relief under either section 82 or section 123. These applications are accordingly dismissed.

2252-79-R Retail Clerks Union, Local 409, Applicant, v. Metropol Security Limited, Respondent

Bargaining Unit – Security Guards – Whether by-law enforcement officers and airport security officers security guards – Whether interchange among guards and non-guards making unit appropriate

BEFORE: D. E. Franks, Vice-Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

APPEARANCES: *Patrick Smith for the applicant; Wallace M. Kenny and Pat Haney for the respondent.*

DECISION OF THE BOARD; December 18, 1980

1. The name: “Metropolitan Investigation Security (Canada) Ltd.” appearing in the style of cause of this application as the name of the respondent is amended to read: “Metropol Security Limited”.

2. This is an application for certification by the respondent trade union wherein the applicant seeks to be certified as bargaining agent for the employees of the respondent. The respondent operates a security guard company in the Thunder Bay area. It is not in dispute between the parties that the applicant Retail Clerks Union, Local 409 admits to membership of persons other than security guards. The Board has before it the report of a Labour Relations Officer and the argument by counsel on the effect to be given section 11 of The Labour Relations Act in this case.

3. The employees of the respondent in Thunder Bay can be divided into three groups or categories.

Category I The By-Law Enforcement Officers for the City of Thunder Bay.

Category II The Security Guards of the Thunder Bay Airport.

Category III The remaining employees of the respondent.

We will deal with each of these categories in detail.

4. Dealing first with the employees in Category I, the By-Law Enforcement Officers. This service is supplied under a contract to the City of Thunder Bay on behalf of its parking authority. The contract calls for a number of Enforcement Officers to write tickets for parking violations. These By-Law Enforcement Officers are uniformed and patrol given areas of the City. They are all licenced security guards. Also, supplied pursuant to that contract are services concerning parking garages, namely, the operation of the toll booths for the parking garages. On the basis of the report of the Labour Relations Officer, it is clear that the only duty of the By-Law Enforcement Officers is to complete tickets with respect to violations of parking by-laws. This does not extend to traffic laws and, indeed, if anything beyond the writing of a ticket occurs, the By-Law Enforcement Officers are clearly instructed to call the police as would any citizen.

5. The employees in Category II are Airport Security Guards. Their duty is to conduct a check of all passengers and their baggage before they board airplanes at the Thunder Bay Airport. All handbaggage is scanned with an X-ray device and all passengers are scanned by a walk-through metal detector, and if necessary a hand scanner is used to further examine a passenger. The report of the Labour Relations Officer indicates that in performance of this duty the Security Guards are acting on behalf of the various carriers which used the Thunder Bay Airport.

6. The reason for the check of both the passengers and their carry-on luggage is to detect weapons or devices which may be used in the "hijacking", i.e., pirating of aircraft. Thus, the Security Guards are trying to detect weapons or devices which may be used as weapons to prevent passengers from bringing such weapons or devices onto an airplane. The personnel at the Thunder Bay Airport are all licenced security guards. It is clear, however, that they have no power to arrest. If a passenger refuses to submit to the appropriate scan, their instructions are to refer the passenger back to the carrier. In the event that a weapon, such as a handgun is discovered, their instructions are not to arrest the person with such a weapon but rather to immediately inform the local police or the R.C.M.P.

7. The persons employed in Category III are Security Guards who work pursuant to certain security contracts provided by the respondent. This involves, typically, providing security services at hospitals and various commercial establishments. From the report of the Examiner it is clear that their duties involve the protection of property and, accordingly, all are licenced security guards. There is also no doubt that in the course of their duties, they are required to protect the property of the client in the client's position as employer of employees. Indeed, the Labour Relations Officer's report is clear that from time-to-time they perform such functions in the context of labour disputes.

8. In the course of the Labour Relations Officer's inquiry, there was discussion about the interchange of people from the various categories. Clearly, there is little or no interchange between those in Category III and those in either in the first or second Category of employees. The evidence of interchange was of employees in Category II, that is the Airport Security Officers being used from time-to-time as security guards in Category III. However, the evidence in this regard is quite clear that at the time when persons from Category I and Category

II were employed in Category III, it was voluntary employment on their part. Further, this occurred on their normal days off. That is, it is clear in the report of the Labour Relations Officer that any interchange was voluntary and not an incident of employment in Category I or Category II.

9. The respondent in the present case argues that employees in all three categories are security guards and, therefore, the applicant trade union is not entitled to be certified as bargaining agent on their behalf. Section 11 of *The Labour Relations Act* reads as follows:

“The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers’ organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.”

It is clear that the first thing that must be determined is whether persons in the various categories are “employed as a guard to protect the property of an employer”.

10. With respect to the persons in Category I and Category III, the answer to this question is quite obvious. The persons in Category I, that is the By-Law Enforcement Officers, do not in the course of their duties protect any property at all. Therefore, they are not affected by section 11. Conversely, those employees in Category III, the general security guards employed by the respondent do, in the course of their regular duties, protect the property of employers. They are, therefore, guards within the meaning of section 11.

11. With respect to the employees in Category II, the Airport Security Guards, the matter is somewhat difficult. It can be argued that their function is to protect aircraft and passengers in aircraft from hijacking. Insofar as the airlines are employers, it might be said that they are protecting the property of an employer. However, such an interpretation would strain the plain language of section 11, clearly this section reads “employed as a guard to protect the property of an employer” and does not read, for instance, “employed as a guard to protect the property of a person”. The term “employer” as used in section 11 brings into play the employment relationship, that is, the guard protecting the property of an employer as employer. The security guards at the airport do not protect the property of the airlines as employers but rather they protect the property of the airlines from hijackers. Therefore, they are not guards within the meaning of section 11.

12. We are faced then with the situation that the employees in Categories I and II, that is the By-Law Enforcement Officers and the Airport Security Guards, are not guards within the meaning of section 11; whereas, the remaining employees of the respondent, those in Category III are security guards within the meaning of section 11. This in turn raises the problem of whether there is an appropriate unit for collective bargaining and if there is, what is such an appropriate unit in the light of section 11 of the Act. The respondent argues that the only appropriate bargaining unit is an all employee unit. Consequently, the Board ought not to certify the applicant. However, on the basis of the evidence contained in the report of the Labour Relations Officer, it is clear that the relationship between Categories I and II and

Category III is not one of regular interchange as part of their employment. That is, in the normal course of their duties, they are quite distinguishable groups from those employed in Category III.

13. The applicant takes the position that those who are not employed as guards within the meaning of section 11 are in an appropriate unit for collective bargaining unit whether this includes the employees in Category I or Category I and Category II.

14. The Legislative prohibition which arises from section 11, does not extend so far as the respondent argues. The Board is prohibited from including in a bargaining unit with other employees, persons employed as guards to protect the property of employers. It does not prohibit the Board from certifying a unit with such guards excluded. Indeed, the opening words of section 11 indicate that a bargaining unit with guards excluded is appropriate. Indeed, if the employees in Categories I and II are not guards within the meaning of section 11, then a union consisting solely of guards might lose its status under section 11 if it admitted them into membership. Accordingly, we find that the persons employed in Category I and Category II could form an appropriate bargaining unit.

15. Having regard to the foregoing, the Board finds that all employees of the respondent in the City of Thunder Bay other than those employed as guards protecting the property of employers, save and except supervisors, persons above the rank of supervisor and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. For the purpose of clarity, the Board further notes that the bargaining unit includes those employees employed as By-Law Enforcement Officers and those employees employed as Airport Security Guards.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on March 11, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

2432-79-R Homida Ali, Applicant, v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America (U.A.W.), Respondent, v. **Ontario Hospital Association** (Blue Cross), Intervener.

Evidence – Petition – Termination – Whether Board inferring management involvement from prior conduct – Whether collection of signatures in presence of management and/or company premises affecting voluntariness

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

APPEARANCES: *Deborah Cowan, Susan Traynor and Homida Ali for the applicant; L. A. MacLean, R. Nickerson, H. Carl Anderson, and Clare Meneghini for the respondent; D. K. Gray and George Ubels for the intervener.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG: December 23, 1980

1. This is an application for a declaration terminating bargaining rights, pursuant to the provisions of section 49 of *The Labour Relations Act*. The relevant portions of that section read as follows:

49.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

...

(3) Upon an application under subsection 1 or 2, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause *j* of subsection 2 of section 92 that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition of the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

...

Section 53(3) of the Act provides:

Where a trade union had given notice under section 13 and the employees in the bargaining unit on whose behalf the trade union was certified as bargaining agent thereafter engage in a lawful strike or the employer lawfully locks out such employees, no application for certification of a bargaining agent of, or for a declaration that the trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made,

- (a) until six months have elapsed after the strike or lock-out commenced; or
- (b) until seven months have elapsed after the Minister has released to the parties the report of the conciliation board or mediator or a notice that the Minister does not consider it advisable to appoint a conciliation board,

whichever occurs first.

The respondent trade union ("the UAW") was certified on March 14, 1979 as the bargaining agent for a unit of employees of the Ontario Hospital Association's Blue Cross operating division. The employer is a voluntary association of hospitals in the province of Ontario, and its Blue Cross division is a major supplier of private health insurance on a non-profit basis. The unit is described as follows:

All office and clerical employees of The Ontario Hospital Association within the Municipality of Metropolitan Toronto, save and except section heads, managers or co-ordinators, persons above the rank of section head, manager and co-ordinator, secretaries to those above the rank of supervisor, audio-visual staff, sales staff, communications staff, print shop staff, mail room clerks regularly assigned to reading mail, internal auditors, consultants, all employees in the Hospital Employee Relations Services Department (including personnel and payroll staff), all employees of the Investment Services Department, all employees of the Hospital Accident Prevention Department, systems analysts, programmers and all computer operations staff, maintenance engineers, pharmaceutical chemists, students employed during the school vacation periods and persons regularly employed for not more than twenty-four hours or less per week.

3. A conciliation officer was appointed by the Minister of Labour to assist the parties in their efforts to reach a collective agreement. No agreement was reached, however, and the respondent was in a lawful strike position on or about July 1, 1979. From the statements of both parties filed as exhibits in this matter, it is fair to say that the parties' respective positions over the terms of the "Union Security" clause (and in particular whether the check-off of union dues would be made compulsory for *all* employees) was a major stumbling-block in the negotiations.

4. A strike by members of the bargaining unit did in fact commence on September 24th, 1979. At that time, some 200 employees, being roughly half of the employees in the unit, participated in the strike, and picketing was heavy. Over the months those numbers diminished, however, so that by the time these proceedings came on for hearing in April of this year, approximately 70 employees remained on strike. Of the others, some had resigned to take employment elsewhere, but most, it would appear, decided to return to work.

5. An application to terminate the bargaining rights of the UAW was filed with the Board on February 21, 1980, but was dismissed as being premature. The present application was then filed on March 26, 1980, and its timeliness is not disputed. According to the lists filed by the employer, there were 411 employees in the bargaining unit on the date that the application was made. This includes both employees who, according to the employer's records, continue to be on strike, as well as new employees hired by the employer since the strike began. There was filed in support of the application a series of "petitions" which were headed:

"O.H.A. BLUE CROSS EMPLOYEE CERTIFICATION
BY U.A.W.

PETITION

We the undersigned employees of O.H.A. Blue Cross hereby signify
that we no longer wish to be represented by the U.A.W.

WITNESS

SIGNATURE"

and which together contain the signatures of 257 persons. Of those signatures, 237 correspond to the names of persons on the employer's list. There were some minor challenges by the respondent to the employer's list, but the Board advised the parties that even if the respondent were correct, the petitions would still contain the names of more than 45% of the employees who were employed in the unit on the date that the application was filed. This being the case, the Board announced that it would proceed to hear the evidence which the applicant was relying upon to satisfy the Board that the act of each employee in signing the petition was a voluntary one.

7. In the course of the evidence, counsel for the respondent insisted upon his right to place before the Board the full history of the bitter relationship that had evolved between the employer and the respondent, including the various items of propaganda which characterized that relationship. Counsel's purpose was to demonstrate to the Board that the real "mover" behind the petition was the employer itself, who by its conduct and statements had deliberately created an atmosphere which was calculated to, and did, lead directly to a termination application. The Board at the outset indicated its reservations over the relevance of that line of inquiry, but ruled that it could not say with certainty that the respondent's evidence would not disclose employer conduct or statements linked to the termination application. The respondent accordingly was permitted to proceed in the fashion counsel sought. This, of course, prompted the employer to counter with evidence showing the statements and events of that history in a different light, aimed at demonstrating to the Board that it was more likely the actions of the UAW and its supporters which prompted the termination application. The net effect of all of this was to transport into the hearing-room, and make a part of these

proceedings, the very dispute which characterized this relationship on the outside, to the obvious detriment of those petitioning employees seeking a timely response from the Board to their application. As Ms. Cowan, one of the employees who acted as spokesperson for the petitioners, stated in her eloquent summation, she and her co-petitioners had no interest in getting involved in the dispute between the company and the union, and submitted that the employees throughout the history of this bitter conflict had become the “forgotten people”.

7. The Board's experience with the present proceeding has confirmed the wisdom of the more narrow evidentiary approach which it adopted in the *Ottawa Journal* case, [1978] OLRB Rep. Mar. 291, where the matters sought to be relied upon by the respondent trade union were not a great deal different from the present case. In refusing to entertain such evidence, the Board had this to say:

7. Counsel for the respondent asks the Board to draw the inference that because of the climate generated by the protracted labour dispute the statement in support of the termination application is not a voluntary one. In so doing the respondent is asking the Board to draw the inference that free expression has been thwarted because of circumstances *not directly related to the origination, preparation and circulation of the statement*. Even if the Board assumes that the respondent can establish the material facts upon which it intends to rely – and indeed a number of these facts are a matter of record having been set out in the Board's decisions dealing with the section 79 complaints brought by the parties – the Board would not be prepared to draw the inference which the respondent suggests. (emphasis added)

While the history of the underlying labour dispute may be of some relevance to the issue before the Board on a termination application, it is essentially a collateral matter and may be of so little weight as to justify a different balancing of interests than that adopted by the Board in the present case. The Board finds nothing in the evidence, notwithstanding the olympian efforts of counsel for the UAW, to demonstrate to it that the actions of Blue Cross had as their real purpose the origination of a termination application, or prevented employees from making up their own minds on union representation.

8. Much of Mr. MacLean's argument attacking, in particular, written communications from Blue Cross to its employees, “overlooks” the fact that they arose in the context of the employer's efforts to rally employee support first to head off a pending strike, and then to beat it. The only evidence to the contrary came from the petitioner Hazel Jones, but the Board has reviewed and assessed the character of Mrs. Jones' evidence in full, and is satisfied that her statements can be regarded as no more than a recognition that Blue Cross was seeking to align employee support behind *it* rather than the UAW in the economic confrontation that was taking place. Such employer conduct in these circumstances is in itself not out of the ordinary, and the propaganda which emanates from both sides in this context tends to be manifestly unflattering. If the employer's actions overstep the bounds of lawful conduct, or are considered to be something other than they appear, the trade union has its remedies (see, for example, *Radio Shack*, [1979] OLRB Rep. Dec. 1220).

9. We turn then to the actual origination and circulation of the petition. The evidence established that after the strike commenced in September, the employer made it a practice to

hold weekly meetings in the auditorium to discuss matters pertaining to the strike. The discussion was generally led by George Ubels, the Associate Director of Human Resources, and ranged from comments about the negotiations to arrangements for bus pickups and overtime. Progress reports on the re-acquisition of business initially lost because of the strike, and on additional employees abandoning the strike and returning to work, were also a regular part of these meetings. The purpose of these meetings, as one of the employee-witnesses put it, appeared generally to be to keep people informed and to boost morale. As the strike lost some of its momentum towards November or December, the frequency of these meetings decreased. It appears that on occasion employees would ask Mr. Ubels at these meetings what they had to do to get rid of the union, and the response was generally that management could not advise them about that. That one exception appears to have been when an employee in October or November asked how and *when* to get rid of the union, and Mr. Ubels responded that this wasn't the time. After one of these meetings, Hazel Jones, an employee who had been opposed to the union from the beginning, decided to prepare and circulate a petition. She went to the employee, Susan Little, whom she heard ask one of the questions about getting rid of the union, and enlisted her support.

10. The petition typed by Mrs. Jones was not filed in support of the present application other than as an exhibit. That petition reads:

**"APPLICATION FOR DECLARATION
TERMINATING BARGAINING RIGHTS"**

Mrs. Jones kept her copy of the petition on her desk in a file folder for three consecutive days, and anyone who wanted to could come by and sign it. As Mrs. Jones said, "news travels fast", and she found that employees knew of the petition without being approached. If an employee came to sign the petition while Mrs. Jones was away from her desk, the person who sits next to her would direct them to the petition. The desk of Mrs. Jones' Section Head (a member of management) faces that of Mrs. Jones, but Mrs. Jones testified that to her knowledge, the petition was never signed with anyone from management present. Other employees were also given copies of the petition, which they circulated. According to the evidence of these employees, the petition in large measure was simply being passed from person to person, and no one was actually witnessing the signatures.

11. Eventually the present applicant, Homida Ali, became involved with the first petition. Mrs. Ali had originally been a member of the UAW, and in fact played a role in the organizing campaign. Prior to the certification, however, she became disenchanted with certain inconsistent statements made to her by the UAW's staff representative, and attempted to ascertain how to go about withdrawing from the union. She approached members of management, but they told her to speak to the union. She then telephoned the Labour Board, and was told she could write a letter to the union. It appears that Mrs. Ali also raised the question of how employees in general could oppose the union. She was told that a petition could be taken up, but that it ought not to be done on company premises. Mrs. Ali made further calls to the Board, and again was given the same advice. Mrs. Ali decided that there was "no way" she was going to attempt to canvass that many employees away from the premises, and decided to let the matter end at cancelling her own membership in the union. She was in fact interviewed by the lawyer for Blue Cross at the time of the certification with respect to allegedly intimidatory statements she had made in attempting to solicit for the union. She was summonsed by Blue Cross to testify at the Board hearing of the matter, but was not called upon to do so.

12. Nothing further occurred in terms of a petition until after the strike had been under way for some period of time. As noted, various employees from time to time at the staff meetings asked about getting rid of the union. The employee that Mrs. Ali heard ask this question was Kathy Lomas. Mrs. Ali was speaking to Kathy Lomas after the meeting and asked her if she knew what was required. Miss Lomas responded that it was easy - "you just get names on a list". Mrs. Ali stated that there was more involved than that, that you had to go before the Labour Board, and that she understood you were not supposed to get involved with a petition on company premises. Miss Lomas said: "The union gets cards on company premises, why can't we do a petition on company premises?" She asked Mrs. Ali to help, and Mrs. Ali said she would have to think about that.

13. By the time Mrs. Ali decided to help, the first petition had already been begun by Hazel Jones and others. Mrs. Ali herself considered it unfair that a petition could not be circulated on company premises, and so attempted to find a labour lawyer who could advise her. She contacted a number of sources, including the Law Society and the Law Library, and came up with a list of names. Kathy Lomas then also gave her a piece of paper with two lawyers' names on it, and one of those names matched a name on her own list. She therefore called that lawyer, who thus came to represent the petitioners in the present proceedings.

14. Mrs. Ali joined in the circulation of the first petition, and obtained about 15 signatures. She then became concerned that the document was beginning to look "unprofessional", with, for example, duplicate names being crossed off on many pages, and she also had doubts about the adequacy of the heading. She therefore took the whole petition, consisting of some 155 signatures, to her lawyer for discussion, and was advised to abandon that petition and begin again. This she did, using new pages typed in the lawyer's office. She gave copies of the fresh petition to Hazel Jones, Susan Little, Marg Speedie and Kathy Lomas, as well as to Debbie Cowan, who sits across from her at work. Debbie Cowan asked if it would be all right to give a copy to another employee, Susan Traynor, and Mrs. Ali said that it was, "if you think you can trust her". The first petition had been circulating in January of 1980, and possibly before. The petition's sponsors decided that they would begin to circulate the new petition on February 1. Kathy Lomas was ill and unable to testify, and the 8 signatures which she ultimately collected must be discounted. The other six sponsors, however, appeared before the Board and gave their evidence as to the manner in which the signatures that they witnessed were collected.

15. It might be noted at the outset that the office employees who make up this unit are spread over 6 floors of the Ontario Hospital Association building, and the evidence establishes that considerable movement by employees from section to section is common during the course of a day. There is, on the main floor, a cafeteria which is normally used not only by bargaining-unit personnel, but by members of management and the public as well.

16. Susan Little is a Senior Clerk in the Claims section. It appears she was originally a union member, but became disenchanted at the time of the strike. She testified that she did not like the way the strike vote was handled, and that she herself could not afford a strike. Mrs. Little collected a large number of signatures on the first petition, and confirmed that the bulk of the 68 persons she had had sign the second petition had also signed the first. She collected the majority of her signatures on the second petition in the cafeteria, going, as she testified, from table to table with the piece of paper in her hand. She could not say whether her supervisor would have observed her doing this. The remainder of her signatures were collected

either in the washroom, at pre-arranged meetings, or at her own or another's desk, before the start of work.

17. Marg Speedie rides the bus to work each day with Mrs. Ali, and was asked by Mrs. Ali to help gather signatures. She was at this time a clerk in the Group Billings department. Mrs. Speedie had been a UAW member, but resigned at the time of the strike. She had herself signed the first petition, and obtained 10 signatures on the second. Her signatures were collected at people's desks before work, and also in various non-working areas throughout the day. When people who signed the first petition asked her why they had to sign again, she told them that as far as she knew, it wasn't done properly.

18. Debbie Cowan works beside Mrs. Ali as a pay-direct billing clerk. She testified that she was neutral towards the UAW at the beginning, but that her feelings changed over a period of time. She agreed to help Mrs. Ali with the petition when asked, and was one of the individuals responsible for circulating around the office various newspaper articles dealing with the strike situation at Blue Cross. She obtained 38 signatures in all on the petition, the bulk of these in the cafeteria. The remainder of her signatures were collected in non-working areas during the course of a day. Some employees were asked to sign as they ate lunch on benches located in the main-floor lobby, and others as they were encountered by Miss Cowan getting off the elevators. Miss Cowan also arranged to meet a number of employees, one at a time, in the washroom for this purpose. As she testified: "I was in there a lot".

19. Miss Cowan gave a sheet of the petition to her friend, Susan Traynor, and asked her to sign the people in her section. Miss Traynor obtained 7 signatures on the petition, some before work and others in the cafeteria and washroom. She had also canvassed employees in the department generally on the first petition, going from desk to desk (apparently during working hours), and obtained some 15 signatures. She agreed in cross-examination that she was able to observe Miss Cowan going from table to table in the cafeteria with the petition, that she knew what Miss Cowan was doing, and that everyone at her table would know what Miss Cowan was doing as well.

20. Hazel Jones, it will be recalled, was the originator of the first petition. She was at that time a clerk in the Group Billings department. She had previously been a Section Head for 3 years in the same department, but had reverted to clerk in March of 1979 for medical reasons. Employees in the department still came to her on occasion if they had a problem with their work, and she generally took the place of her Section Head when the latter was away. She normally ate lunch and took her breaks with both her own Section Head and the Section Head of another department. Mrs. Jones was opposed to unions in general, and never wanted the UAW. As a Section Head at the time of the organizing campaign, however, she and the other members of management were advised by Blue Cross not to get involved. She testified that she has never discussed either petition with the two Section Heads she ate with, or any other member of management. She obtained a number of signatures on the first petition, and 17 on the second. It appears that many of these were the same people, and she had to explain that they changed the heading. She testified that the way in which she changed the manner of circulation was to keep the petition in her desk drawer, rather than in a folder on the desk. As with the first petition, people heard about the petition and came to her desk to sign it, apparently during the work-time of Mrs. Jones at least.

21. Mrs. Ali was the last petitioner to testify, and was personally responsible for the

collection of 109 signatures, being close to one-half of all of those collected. She has been employed at Blue Cross for 3 years, beginning as a billing clerk in Group Billings. She worked for two weeks in the Personnel Department and then became a billing clerk in Pay Direct where she has been for the past two years. At the time of this petition there were 23 people working in her department, including a manager, a supervisor and two Section Heads. While the room in which they work is irregularly shaped, it appears from Mrs. Ali's evidence that at least three of the management personnel are situated reasonably close to her desk, and would have a clear view of it. It was her evidence, however, that as far as she knew, no signatures were collected in the presence of management. Mrs. Ali further testified that she normally takes her breaks with a Section Head from another department.

22. The evidence of the other petitioners confirms that it was "common knowledge" in the building that Mrs. Ali was the one responsible for circulating the second petition, and employees would sometimes approach her at her own desk to sign. Mrs. Ali was in fact the target of substantial threats and verbal abuse for her efforts, and these incidents received wide prominence in the local news media. Like Miss Cowan, Mrs. Ali tended to sign people up wherever she met them in the lobby, by the elevators, in the washroom, and sometimes at their work stations in other departments.

23. The bulk of her signatures, however, were collected in the cafeteria, particularly on February 8th. That was a day she had asked to have off "for personal reasons", as company policy allows. Her reason for wanting time off that day was to assist her husband in picking out a new car. Her husband handled most of the details, and as the car dealership was located close to Blue Cross, she decided "to kill two birds with one stone" and collect signatures on the petition during the periods that her husband didn't need her. She therefore had her husband drop her off at Blue Cross before 10 that morning. She testified that except for two brief excursions with her husband in the early afternoon, and going to the telephone booth once at the end, she spent the entire day in the cafeteria collecting signatures. One or two of the girls from her department mentioned to her that they thought she had the day off, and Mrs. Ali explained to them that she was doing some business and also getting names on the petition. She testified further that generally she did not bother to tell people why she was off because "it was obvious what I was doing".

24. One of the problems that Mrs. Ali indicated she was faced with was that she was approaching a lot of people that she did not know, and could not tell who was management and who wasn't. At the start of the strike, all personnel were required to wear coloured tags to identify their level in the organization, but these fell into disuse after Christmas. Her problem was compounded by the fact that it was common for management and non-management personnel to eat together at the same table (tables range in size from four to ten chairs). As she said, many people would be promoted and keep their same friends. Her evidence on this matter was as follows:

"The people I signed were sitting at various tables. I'm not sure how many were in each group. There were some sitting who did not sign. Most of the people at the tables were in the bargaining unit. I'm not sure who is in management and who isn't."

Mrs. Ali further testified that she generally asked people she did not know if they were in the bargaining unit, but it is clear from her evidence that people who did *not* sign did not always

identify themselves, and when asked specifically, she could not say with certainty whether all of those other people at the table were in the bargaining unit. If she came to a person who *did* say she was in management. Mrs. Ali would simply move on to the next table.

25. Mrs. Ali was asked if her own supervisors had learned that she had spent her “day off” in the cafeteria getting signatures, and she said that they must have, because the next day they were visibly annoyed with her. She also got the impression, she said, from something else that happened that George Ubels knew as well. The only other feedback that she got was through a friend of hers who advised her that one of the union supporters commented that Mrs. Ali “was crazy to be there doing that”.

26. A final point that should be mentioned concerned the “whiting out” of a signature on the petition between Nos. 239 and 240. Mrs. Ali testified that when she met #240, a new employee in the mailroom, he had someone else with him. Number 240 signed but the other person did not, indicating that she had signed before. When Mrs. Ali returned to her desk she telephoned #240 and asked him who the other person was. He answered: “That’s my boss”. Mrs. Ali then advised him that she was taking his name off. The next day Mrs. Ali was able to ascertain that the second person was *not* a member of management (she in fact is not) and that she had signed the petition previously. Mrs. Ali then telephoned #240 again and told him he could put his signature back on the petition, which he did.

27. The respondent was content to call only one witness in reply to the petitioners’ evidence. That was a Blue Cross supervisor, Linda Holmes, who attended under summons. Mrs. Holmes had charge of the department in which one of the leading union supporters, Elystra Cust, worked. Miss Cust was a member of the union’s negotiating committee, and, by virtue of an agreement reached at the bargaining table, was expressly prohibited from engaging in union activity without consent during working hours. Miss Cust was allegedly involved in a minor infraction of this prohibition prior to the strike, while under the supervision of Mrs. Holmes, and Mrs. Holmes was required by Blue Cross to sign a letter of warning to Miss Cust. It is evident that Mrs. Holmes felt some personal discomfort over her involvement in this incident.

28. Some months later, during the circulation of the petition, Mrs. Holmes was standing in her department talking to her Section Head. Mrs. Ali approached the two of them, and, mistaking the Section Head for another employee in the department, asked her if she wanted to sign the petition. Mrs. Ali was apprised of her mistake, and was told that the person she was looking for, Phyllis Bowden, was on her break. A few minutes later Mrs. Ali returned to the department, after Mrs. Bowden had returned, and approached Mrs. Bowden at her desk. Mrs. Bowden’s desk is located a few feet in front of Mrs. Holmes’ office, and as Mrs. Holmes was standing behind her desk at the time, she was clearly visible to Mrs. Ali. Mrs. Ali, in fact, looked directly at Mrs. Holmes while Mrs. Bowden signed the document which Mrs. Ali had placed on her desk. Mrs. Holmes was able from where she was to make out 2 or 3 typed lines at the top of a page, with two columns of names underneath. She did not overhear the actual conversation. Mrs. Holmes added that Mrs. Ali had seen her in her office on several occasions in the past, and definitely knew who she was. Mrs. Holmes went immediately to report the incidents of that morning to a member of management (the same member involved with her in the Cust incident), and was told to “forget it”.

29. At approximately the same time, Mrs. Holmes attended a regular meeting of

supervisors and section heads, at which they were told by Mr. Ubels that there was talk of a petition being circulated on the premises. Mrs. Holmes testified that everyone snickered at that, because they were already well aware of that, and Mrs. Ali's name was mentioned. Mr. Ubels instructed them that if they happened to see the petition being circulated, they were to "take two steps back". Mrs. Holmes also confirmed in her evidence, however, that at the time of the original organizing campaign as well they were instructed not to answer any employee questions, or try to sway them. Mrs. Holmes also recalls mention at this meeting of a rumour that CUPE was waiting in the wings should the UAW be removed from Blue Cross.

30. Mr. Gray in his able submissions on behalf of Blue Cross presented to the Board a common-sense analysis of the case law dealing with the matter before us, and the Board cannot quarrel with any of the principles which have been put forward. It will be recalled that Mrs. Ali spoke to members of the Board's administrative staff on several occasions, and each time was advised that her petitioning activities ought not to be conducted on company premises. While perhaps prophetic, this advice in fact reflected an overly strict view of the Board's normal requirements in this regard. As was stated in *Parker's Dye Works and Cleaners Limited*, [1974] OLRB Rep. Dec. 859 at para. 37:

... The Board, of course, has often gone on record for holding that mere organization of a petition on employer premises and employer time is not in itself cause to set aside an otherwise voluntary statement of desire. (See *Pyrotenax of Canada Ltd.* case, 60 CLLC ¶ 16,1970.) Nor will mere knowledge by management of the securing by employees of a statement with a view to terminate an incumbent union's bargaining rights justify the raising of an inference of employer influence (see *The Cooper-Weeks Limited* case, [1967] OLRB Rep. Aug. 455.) Indeed, the origination, preparation and circulation of a petition in support of an application for termination may very well take place on company premises and with the knowledge of management but so long as the Board is satisfied that the statement filed is "a voluntary expression" of employee desires, the Board will give effect to the statement. (See *The Data Business Forms Limited* case, [1974] OLRB Rep. Feb. 63.) The Board's concern in inquiring into the origination, preparation and circulation of a statement of desire is that it be satisfied on the basis of first hand evidence that the voluntary wishes of employees in the bargaining unit have been reflected.

31. The sole issue before the Board in every case regarding a "petition" is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts. As the Board commented in *N.J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for

certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

See also *Northern Telecom Canada Limited*, [1979] OLRB Rep. April 330.

32. Similarly, in the present case, having regard to the simple history of this matter, and the demeanour and evidence of the various sponsors of the petition as to their reasons for embarking on the course of conduct that they did, the Board is satisfied that these individuals acted on the basis of their own initiative and personal choice. The origination of the petition, in other words, is not a matter that troubles the Board in the present case. That, however, is not an end to the matter. While the signatures on the documents before the Board represent in excess of the 45 per cent required under section 49(3) of the Act before the Board can direct the taking of a representation vote, the Board still must ascertain whether the signatures of not just the petition's sponsors, but of a full 45 per cent of the unit, are a voluntary reflection of those employees' wishes. It must be remembered that the Board has the benefit of the direct evidence of only the sponsors of the petition who appear to testify; the remainder of the employees' wishes can be ascertained only through the evidence that they signed the petition, together with the inferences that the Board is able to draw from the circumstances under which they signed. As far as these other employees are concerned, their action in signing the petition presented to them represents no more than what the Board has described as their "ostensible" wishes, and the Board still has upon it the statutory obligation to ascertain from all of the surrounding evidence whether their actions in signing can be taken to have been voluntary. While background factors may, once again, be properly taken into account in weighing this issue of voluntariness, particularly where the evidence on circulation is at all equivocal, the Board is not entitled to simply assume from this alone that any employees who have signed have done so voluntarily. To do so would render meaningless the insertion of the word "voluntarily" in the subsection, together with the inquiry which the Board has always considered it necessary to undertake in these cases. To this extent, the actual issue before the Board and the exercise which it must perform are essentially the same as those before the Board in a certification proceeding, and cases like *J. A. K. Electrical Contractors Limited*, [1977] OLRB Rep. May 275, must be read as saying no more than that; they are not inconsistent with the *practical* differences between the two alluded to in, for example, *N. J. Spivak*, *supra*. As the *J. A. K. Electrical* case says, at paragraph 5:

... As one deduces from reading the *Remington Rand Limited* case the Board applies the same standards to the evidence supporting an application for termination as it applies to petitions in opposition to a trade union that arise during the certification procedures. This position is outlined in *Riel and Int. Bro. of Teamsters Local 230* (known as the

Harry Haley & Sons case) 58 CLLC ¶ 18,106 where the Board described its approach in the following way:

“The Board has consistently held that like principles should be applied to the documents filed in support of applications by employees for termination of bargaining rights. In other words the Board has taken the position that even though a majority of the employees in the bargaining unit have signed a document purporting to be an expression of their wishes that they no longer wish to be represented by a trade union, there may be circumstances surrounding the origination or circulation of the document or documents in question which do not make it incumbent on the Board to direct a representation vote.”

In fact the use of the word “voluntary” in section 49(3) seems to be a specific legislative direction to the Board to inquire into the history of *ostensible* wishes of those employees subscribing to an application for termination; (see *P. Chapman Cartage Ltd.* [1972] OLRB Jan. 356). [emphasis added]

The Board’s function, therefore, is still to “protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent” (cf. *Peel Block Co. Ltd.*, 63 CLLC ¶ 16,227).

33. The Board, therefore, must go on to consider the evidence of the manner in which this petition was circulated by its sponsors, and whether, based on that evidence, the Board has some reasonable assurance that the other employees who signed did so voluntarily. In doing so, the Board must not lose sight, as indicated before, of the history of the present bargaining relationship, and the time at which this application has arisen. Nor is the Board prepared to conclude, as stated before, that the natural polarization and struggle for employee support which is characteristic of an economic confrontation renders it impossible for the employees to express their own wishes in a termination application. Indeed, the legislation, and in particular section 53(3) of the Act, contemplates just the opposite (see again the *Ottawa Journal* case, [1978] OLRB Rep. March 291 at paragraph 8), and ensures that the employees do *not* become “the forgotten people”. Where the polarization is so intense, however, the Board must still be concerned that the signatures in support of a termination application be gathered in circumstances which permit the employees to feel with some comfort that management will not be made aware of which employees in the unit supported the efforts of the petitioners, and which of the employees did not. As in certification cases, the Board becomes concerned when “[t]he evidence taken as a whole . . . supports the inference that the employees of the . . . company would logically have assumed that management supported the petition, albeit in a tacit manner, and that the names of those refusing to sign the petition would become known to management” (*Morgan Adhesives*, [1975] OLRB Rep. Nov. 813, at paragraph 31). The question, in other words, is whether management would appear to the employees to be “co-sponsoring” the petition. As discussed, the Board is less inclined to draw this negative inference on a termination application than in a certification proceeding, with its “sudden change of heart”, but the issue of voluntariness never disappears. No one would argue, to put the case in the extreme, that management could conduct its own opinion poll and file it in support of an employee’s termination application. The issue which the Board in each

case must grapple with is whether circumstances were such that employees would have had the feeling that that in effect was what was being done.

34. In the present case, many of the problems which arise could have been avoided had the sponsors of the petition found a way to poll employees away from the premises of the employer. As the Board has said, there is no “rule” preventing the circulation of a petition on company premises. The manner of circulation need not be perfect, but if the sponsors elect to proceed with the petition at their place of work, it becomes incumbent upon them to be sensitive to the impression which their activities can create in the minds of other employees. It is not unusual for petitioners appearing before the Board to point to the fact that *cards* are often signed on company premises. There is, however, a practical difference between the two situations. Persons engaging in *pro*-union activity on company premises are rarely perceived by other employees as acting with the complicity and authority of management. The same cannot be said for *anti*-union activity, and the manner of circulation therefore becomes more significant.

35. The present case can in no way be analogized to the *Ottawa Journal* case, *supra*, where the Board had before it the wishes of a group of petitioners composed entirely of “replacement” employees, whose very employment depended upon the removal of the incumbent union. In the case before us, the number of replacement employees is relatively small, and the evidence of the petitioners makes it clear that there were a significant number of employees working at Blue Cross who continued to be staunch supporters of the UAW. These were, in other words, employees who had, for reasons not difficult to contemplate, abandoned the *strike* (some perhaps before it began), but not the UAW. Accordingly, while the failure of the strike is a factor for the Board to consider, it would be unfair and inaccurate to simply equate it to a rejection of the UAW as bargaining agent, and the Board must resist the temptation to do so.

36. On the other hand, the Board declines to draw a negative inference from the mere fact that the employer was clearly aware of the petition’s existence, or that the employees would reasonably assume that such a development would be welcomed. As the Board commented in *Parker’s Dye Works and Cleaners Limited*, *supra*, at paragraph 36:

... We have no misgiving in finding that [management] knew of the organizing by employees to terminate the respondent’s bargaining rights. Nor do we hesitate to hold that the intervener would welcome the prospect of a successful termination application by the employees in the bargaining unit.

and beyond this in *Cooper-Weeks Limited*, [1967] OLRB Rep. Aug. 455, at paragraph 5:

It may be that, at the time they affixed their signatures to the petition, the employees were aware of, and took into account, the apparent facts of their employer’s dislike for the officials of the respondent trade union. It does not follow from this, however, that the petition itself might not constitute a voluntary expression of the employee’s wishes.

The only problem with the employer deciding as a blanket policy to take “two steps back” is that, depending on the circumstances, it may create a misperception of management involvement which becomes fatal to the petition.

37. There are a number of problems concerning the manner of circulation in this case which must be considered. The first is the relationship between petitions #1 and #2. While the *N. J. Spivak Limited*, [1977] OLRB Rep. July 462 and *Mary Lockwood*, [1979] OLRB Rep. Dec. 1172 cases make it clear that an earlier unacceptable petition need not “taint” a later one, at least where a significant hiatus occurs, the Board on numerous other occasions has in fact refused to recognize a petition on the ground that it has been “infected” by improper circumstances surrounding the taking of a previous petition (see *Levi Strauss*, [1972] OLRB Rep. Dec. 1042). None of the witnesses who testified in the present case suggested that the first petition was handled with anything close to the same discretion claimed for the second petition. One copy of the first petition was simply left in a folder on Hazel Jones’ desk for employees to sign whenever they happened by, including during working hours, and such openness might well have led employees to believe that management was tacitly involved. More importantly, other copies of this petition were simply “passed from person to person”, and this procedure would not be such as to instill in employees a sense of confidentiality about the document. It is significant, therefore, that the second petition began to be circulated at a point in time virtually indistinguishable from the withdrawal of the first one, by much the same people, and that, as the evidence discloses, many of the same employees who signed the second petition had already signed the first.

38. With respect to the second petition itself, the Board also has concerns that with Mrs. Ali and some of the other petitioners having been so clearly identified in their endeavours, the cumulative effect of their visits to other employees, or other employees to them, even to the limited extent that they do appear to have occurred during working hours, together with the repeated number of visits to the washroom, and the visible association between petitioners like Mrs. Ali and Hazel Jones with members of management, would further tend to contribute to a perception by employees that management was implicitly involved with the petition. This case is clearly distinguishable from the *Northern Telecom Canada Limited* case, *supra*, relied upon by Mr. Gray, where the night foreman was present and knowingly permitted the petitioners to collect signatures inside the gate as employees reported for their shift one morning. The evidence in that case left no doubt that employees knew the petitioners were acting not as agents for management, but for the raiding UAW. In our own case we have the “rumour” that CUPE was waiting in the wings, but no activity whatever on the part of CUPE to indicate to employees that anyone might have been acting on their behalf. Similarly, the Board was prepared to allow considerable latitude in the termination case of *Joseph Keller’s I.G.A.*, [1974] OLRB Rep. Feb. 75, where the employees had been required by virtue of a voluntary recognition agreement to pay dues to the union, and had never been happy with either the union *or* the employer about that arrangement.

39. The Board has, however, attempted to be realistic in assessing the evidence in the circumstances of the present case as well, and might not have been persuaded to dismiss the application solely on the basis of the problems already discussed. But the cafeteria, where the majority of the signatures on the petition were collected, raises concerns that are insurmountable. To begin with, we have the entire day which Mrs. Ali took off and used, as she testified was evident to all, to collect signatures on the petition. Any doubts which employees may have had, based on her other petitioning activities, as to Mrs. Ali’s connection to management would likely have been dispelled by that indiscretion, and this occurred early in the period of circulation. Although it is apparent to the Board that Mrs. Ali acted that day without the authority of management, that is not the most probable perception that employees would have had. Certainly the employees in her own department, at the very least, knew that she had been granted the day off, and as the evidence indicated, “news travels fast”.

40. But apart from this, the cafeteria itself was simply inappropriate as a place for the circulation of the petition, as would have been evident to its sponsors had they felt more concern about circulating the petition in full view of management. In this case, it was not sufficient that the petition was circulating in the cafeteria during non-working time. Mrs. Ali (and other petition sponsors) had become highly visible in the campaign, and particularly so when circulating from table to table with the petition. Even though employees are there on their break time, the members of management not only share the cafeteria as well, but regularly sit at the same table as members of the bargaining unit. This arrangement made it particularly inappropriate for Mrs. Ali to approach people with the petition whom she did not know. From the evidence Mrs. Ali clearly would be unaware whether employees at one table were being asked to sign the petition when they knew that managerial persons seated at adjacent tables could *see* whether they did or not. Mrs. Ali could not even say with certainty that that had not happened with members of management seated at the same table.

41. When all the evidence is considered, Mrs. Ali appears to have operated on the basis that what was critical was that no one in management actually *sign* the petition. She appears to have been less careful to ensure that no one was ever asked to sign in the *presence* of management. Any doubt in this regard is dispelled by the testimony of the supervisor, Linda Holmes. It can be seen from her evidence that Mrs. Ali showed no hesitation in interrupting a conversation between a bargaining-unit member and her supervisor to ask the former if she wished to sign the petition. Mrs. Ali was present in the hearing-room when Mrs. Holmes gave her clearly damaging evidence, but made no attempt to rebut any of Mrs. Holmes' statements when the opportunity came for reply. The proposition was put forward in argument that Mrs. Holmes might have observed Mrs. Ali signing Mrs. Bowden to the first rather than the second petition. The problem with this theory is that the Board has carefully examined both petitions, and finds that Mrs. Bowden signed only the second one. The only evidence inconsistent with the conclusions of the Board set out in this paragraph is that pertaining to the incident with #240, where Mrs. Ali purportedly removed his signature because he signed in the presence of his "boss". But Mrs. Ali's evidence leaves the Board in doubt as to what it was in that initial incident which caused Mrs. Ali to telephone #240 afterwards and inquire about the status of the second person, particularly when that person had indicated she would not sign at that point because she had already done so. The Board feels, therefore, that it does not have the whole story before it, and finds that the evidence on this incident does not override the conclusions which the Board must otherwise come to.

42. The Board is not unmindful of the tremendous time and expense which the applicant and other petition sponsors have put into this case. Indeed, counsel for the applicant became concerned, after a number of days of hearings, with the size of the account that was being incurred, and resigned from the case. The application, however, must be decided on the evidence. Even making, as requested, the appropriate liberal allowances, it is impossible for the Board in the present case to say that at least 45 per cent of the members of the bargaining unit have *voluntarily* (that is, in circumstances in which they would not feel that their choice would be known to management) signified in writing that they no longer wish to be represented by the respondent. It may be, in the light of all that has happened, that the requisite percentage of employees in the unit no longer wish the respondent to represent them. The manner of circulation of the petition, however, has made it impossible for the Board to ascertain this, as it must, from the evidence before it.

43. This is not a unanimous decision of the Board, and the majority is mindful as well of

the general argument that a point may be reached in a collective bargaining relationship, particularly after a lengthy strike, where it would not be untimely for the wishes of employees to be tested. There is, however, no automatic mechanism for doing so, and the Board is not entitled to disregard all of the evidence and established jurisprudence in order to accomplish that result. The avenue for accomplishing this has been provided to employees, but the requirements of section 49 of the Act must be met. Under Section 49(3), the Board is required to be satisfied before ordering a vote that 45 per cent of the employees in the unit, a near majority, have *already* voluntarily signified in writing that they no longer wish the trade union to represent them. For the reasons given, the Board in the present case cannot be so satisfied.

44. The application must be dismissed.

DECISION OF BOARD MEMBER J. D. BELL:

1. I dissent. I cannot align myself with a decision which interprets the word "voluntary" so narrowly as to insult the ability of those who signed the petition to perceive what their own true wishes actually are. Before detailing my concerns on this point, I would like to add to the majority's remarks regarding the posture adopted by counsel for the respondent at the hearing on this matter.

2. If the trade union chooses to "fight it out" with the employer and trade blow for blow, as surely the UAW did here, it ought not to come before the Board at the moment it subsequently receives notice of a termination application and attempt to place the employer's prior conduct in a different light.

3. The UAW is no novice to collective bargaining, and clearly took a calculated risk in launching a strike over union security, particularly in a first-contract situation. Often in a first contract trade unions in the past had chosen not to press the union security issue, preferring to first solidify their support in the bargaining unit by way of entering into that first agreement. But here the UAW, for its own reasons, chose to make it a strike issue in the first round of negotiations, and in so doing knowingly exposed itself to the possibility of waning support and ultimately a termination application. It did not, however, confine itself to strike action. Rather, it countered the employer's own resistance by resorting to an economic boycott, and was successful in engineering massive losses of business for Blue Cross. As the exhibits demonstrate, this success was more than amply publicized in the news media and in the UAW's own employee bulletins, and was naturally the subject of active discussion amongst the employees at Blue Cross, without any need for Blue Cross to draw it to any employee's attention. In adopting this course of action which secondarily would threaten employees' jobs at Blue Cross, the UAW must be taken to have assumed a further risk of weakened employee support.

4. All of these steps taken by the UAW were lawful and within its rights to structure its own strategy and goals as bargaining agent. But the Board would have to be naive in the extreme to accept the UAW's submission in the circumstances that Blue Cross alone is to be fixed with the "blame" for any loss of employee support or termination application arising therefrom.

5. I turn now to the question of voluntariness. The rule applied by the majority would appear to be that a petition cannot be regarded as voluntary where the employees who have

signed the petition may have had a reasonable apprehension that their decision to sign or not to sign would become known to management.

6. In my view this is far too constrained a rule. It simply does not account for such factors as the industrial relations atmosphere of the locale in which the petition was signed. There may be situations where the strict rule is appropriate. When, in a small rural location, a group of employees attempt on their own to organize an employer whose operations are international in scope, this Board ought to approach with caution a petition in opposition to certification signed by employees who had previously signed membership cards. In such circumstances it is reasonable to presume the employees who have signed a petition could not have done so voluntarily where they may have had an apprehension that their decision to sign or not to sign would become known to management. This case is significantly different. The vast majority of employees who signed this petition were employees of the intervener during the respondent's organizing campaign. These employees must be taken to have become aware that they could not be discriminated against in their employment for expressing a desire to be represented by the UAW. Surely this Board would be correct in assuming that they also learned that they could not be discriminated against in their employment for signifying (or refusing to signify) that they no longer wished to be represented by the UAW.

7. This case was lost by the applicants when the majority decided to reject the signatures obtained by Mrs. Ali in the public cafeteria. The majority found it to be clear from Mrs. Ali's evidence that "people who did *not* sign did not always identify themselves, and when asked specifically, she could not say with certainty whether all of those other people at the table were in the bargaining unit. If she came to a person who *did* say she was in management, Mrs. Ali would simply move on to the next table". Because an employee's decision to sign or not to sign might become known to management in such circumstances the majority concluded the petition could not be representative of the true wishes of those who signed it. This is typical of the faulty logic which this Board has historically applied to cases of this type. Unless you know that an employee planned to continue to support the UAW before he became aware that management might find out whether or not he signed the petition, you cannot possibly conclude that his signature on the petition is not representative of his true wishes.

8. This Board should not interpret the word "voluntary" so narrowly as to breach its duty to protect the rights of employees to make their own choice. This is not the first time that this Board's interpretation of the word "voluntary" has led the Board to deny to employees the opportunity to express themselves in the most voluntary fashion imaginable, namely, by secret ballot. In the face of this irony I cannot help but be sympathetic to the plea from Ms. Cowan that somewhere along the way the individual employees became the "forgotten people".

9. I would have provided the employees with a chance to express themselves in a vote.

1489-80-U Labourers' International Union of North America, Local Union 183, Complainant, v. **Ontario Humane Society**, Respondent

Practice and Procedure – Witnesses – Newspaper reporter refusing to reveal source of information – Whether information privileged – Whether witness in contempt of Board – Board stating case under *The Statutory Powers Procedure Act*

BEFORE: R. D. Howe, Vice-Chairman, and Board Members T. G. Armstrong and H. Simon.

APPEARANCES: *L. Richmond and B. Yandell for the complainant; Ian F. H. Rogers, Q.C. for the respondent.*

DECISION OF THE BOARD; December 15, 1980

1. The name: "Ontario Humane Society Division 028, Keswick, Ontario" appearing in the style of cause of this application as the name of the respondent is amended to read: "Ontario Humane Society".

2. This is a complaint under section 79 of *The Labour Relations Act* in which it is alleged that the grievors have been dealt with by the respondent contrary to the provisions of sections 14, 56, 58 and 61 of the Act. During the course of the Board's hearing on December 8, 1980, a witness testifying under subpoena refused to answer a certain question put to him by counsel for the complainant. This is an interim decision dealing solely with the relevance of the question asked, the admissibility of the answer and the compellability of the witness to answer the question which was put to him.

3. By decision dated August 8, 1980 in File No. 0782-80-R, another panel of this Board certified the complainant as the bargaining agent for all employees of the respondent at Keswick, Ontario in the Township of Georgina, save and except foremen, persons above the rank of foreman, office, clerical and sales staff. The grievors in the present case are all of the employees in that bargaining unit.

4. Paragraph 4 of the (Form 32) complaint reads as follows:

"The following is a concise statement of the nature of each act or omission complained of . . .

Since on or about July 31st, 1980 and continuing to date, the grievors have been dealt with by the respondent through persons employed by the respondent in managerial or supervisory capacities, contrary to the provisions of sections 56, 58 and 61 of *The Labour Relations Act* in that the respondent improperly and unlawfully:-

(a) interfered with the selection of a trade union or the representation of employees by a trade union;

(b) sought by threat of dismissal and by other kinds of threats and by other means to compel employees of the respondent to refrain

from becoming or to continue to be members of the complainant Union and to cease to exercise other rights under the Act;

(c) sought by intimidation or coercion to compel employees of the respondent to refrain from becoming or to cease to be members of the complainant Trade Union and to refrain from exercising other rights under the Act.

And since on or about August 18th, 1980 and continuing to date the grievors were dealt with by the respondent through persons employed by the respondent in a managerial or supervisory capacity contrary to the provisions of section 14 of *The Labour Relations Act* in that the respondent improperly and unlawfully refused to meet with representatives of the complainant and bargain in good faith and make every reasonable effort to make a collective agreement after having received proper notice under section 13 of *The Labour Relations Act*.”

5. The particulars of the complaint (as set forth in the statement of particulars attached to the complaint and supplemented by letters dated October 30, 1980 and November 5, 1980 from counsel for the complainant to the Registrar of the Board) are as follows:

“i) The respondent provides animal control services under contract with the Township of Georgina at Keswick, Ontario.

ii) The Union commenced its organizing drive in July 1980 and applied for certification on July 11th, 1980. (Board File 0782-80-R).

iii) On July 17th, 1980, T. I. Hughes, Executive Vice-President of the respondent, wrote to the Canadian Union of Public Employees (CUPE) stating, ‘It is my understanding that CUPE has already been certified to represent our employees in the Durham region. Georgina is part of our Durham region and obviously two unions cannot represent the same people. I intend to oppose this application on these grounds and I would expect that CUPE would wish to have something to say in the matter as well.’

iv) As well, on or before July 17th, 1980, the respondent posted the ‘notice to employees’.

v) Despite the above actions, the respondent failed to file with the Board a reply, a list of employees, or a list of specimen signatures, and requested an adjournment at the hearing of August 1st, 1980.

vi) At the hearing of August 1st, 1980, the Board ruled in paragraph 8 of its decision dated August 8th, 1980, *Paragraph 8* ‘It might be noted that the Canadian Union of Public Employees, Local 1323, appeared at the hearing and sought to intervene in the proceedings, on the basis that it represented a unit of employees at the Township of Georgina. Upon being advised, however, that the employees affected by the instant

application have ceased to be employed by the Township, were now employed by the respondent Humane Society, CUPE Local 1323 withdrew its attempt to intervene [sic].'

vii) Accordingly, at the hearing, the Board certified the complainant as exclusive bargaining agent of all employees of the respondent employed at Keswick, Ontario in the Township of Georgina, save and except foremen, persons above the rank of foreman, office, clerical and sales staff.

viii) On August 18th, 1980 a representative of the Union telephoned Mr. Hughes to arrange dates for commencement of negotiations. Mr. Hughes replied that he would not meet the Union because CUPE was appealing the decision of the Board that issued the certificate to the complainant. In fact, no notice of reconsideration or appeal has been received by the complainant and the complainant believes that no such action has been taken by CUPE.

ix) On August 19th, 1980 the Union sent by registered mail, formal notice to bargain in accordance with section 13 of *The Labour Relations Act*.

x) On August 20th, 1980, due to the respondent's refusal to arrange dates with the complainant, the complainant applied for the assistance and the appointment of a Conciliation Officer.

xi) On August 22nd, 1980 the respondent sent a letter to the Union stating inter alia, 'There would appear to be little point in attending a meeting as suggested, since you have already chosen to deny the right of the Society to meet with you and have applied for a Conciliation Officer.'

xii) On September 5th, 1980 the Deputy Minister of Labour advised the parties that Mr. J. Leonard had been appointed as Conciliation Officer and would convene a meeting of the parties Monday, September 22nd, 1980 at the Ministry's offices.

xiii) At the meeting of September 22nd, 1980 Mr. John Kirkland, representative of the respondent, informed the complainant that the respondent would not negotiate an agreement with the complainant because the complainant did not represent employees of the respondent.

xiv) On or about September 30th, 1980, at the Animal Shelter in Keswick, Ontario, representatives of the respondent told the employees that the respondent was refusing to renew its contract with the Township of Georgina and would close its shelters unless the employees revoked their Union membership in the complainant.

xv) On or about Wednesday, October 1st, 1980, the respondent caused to be published in a local paper, namely, *The Georgina Advocate*, that

the respondent was not renewing its contract with the Township of Georgina.

xvi) On October 1st, 1980, the Minister of Labour issued a 'No Board' report, respecting this bargaining unit."

xvii) On or about October 1, 1980, an officer from mediation services, Mr. Berger, contacted a representative of the complainant Union, Brian Yandell and advised Mr. Yandell that mediation services would be convening a meeting with the parties in order to assist them in reaching a collective agreement, on October 15th or October 16th. Mr. Yandell advised Mr. Berger that he was prepared to meet on either of those days and negotiate in good faith.

xviii) On or about October 14th 1980 Mr. Yandell telephone [sic] Mr. Berger to confirm the date of the meeting. Mr. Berger informed Mr. Yandell that he did not feel mediation services would be useful at this time and the meeting was therefore cancelled. This meeting was cancelled because the Respondent would not meet with the complainant Union.

xix) On or about October 8th, 1980 Mr. Hughes sent a letter to the Chief Administrative Officer of the Township of Georgina which letter claims that the Ontario Humane Society may not be renewing its contract with the Township of Georgina due to a Union dispute. The Respondent did not raise this issue with the complainant Union at any time. The complainant Union understands that termination of their contract would result in the employees losing their jobs with the Respondent.

xx) The complainant Union states that the above particulars demonstrate that the actions of the Respondent constitute violation of Sections 14, 56, 58 and 61 of the Labour Relations Act and in particular constitute a failure to bargain in good faith and make every effort reasonable to make a collective agreement in that:

- a. the Respondent has refused to recognize the Complainant as the exclusive bargaining agent of the employees for whom the Complainant was certified,
- b. the Respondent has sought to undermine the position of the Complainant as exclusive bargaining agent of the employees in the eyes of the employees,
- c. the Respondent has threatened and continues to threaten to cancel its contract with the Township of Georgina in order to avoid dealing with the Complainant,
- d. the Respondent has refused to engage in any rational discussion concerning the contents of any collective agreement with the complainant Union.

xxi) On November 4th 1980 the complainant Union received notice from the Board that six separate applications for Declaration Terminating Bargaining Rights had been received by the Board. (Board File 1617-80-R). These applications were made by members of the bargaining unit in this complaint, naming the complainant Union as the Respondent.

xxii) The complainant Union states that the applications for Declaration Terminating Bargaining Rights were caused by and brought about through the actions of the Respondent, as set out in these particulars and in contravention of Sections 14, 56, 58 and 61 of the *Labour Relations Act.*" [emphasis added].

6. One of the witnesses called by the complainant at the hearing of this matter was Robert Johnston, the Managing Editor of The Georgina Advocate, a weekly newspaper serving the Regional Municipality of the Township of Georgina. Mr. Johnston, who testified under subpoena, stated that he wrote the following article which appeared on the front page of the Wednesday, October 1, 1980 edition of the Georgina Advocate (which was entered as an exhibit in these proceedings):

"HUMANE SOCIETY TO QUIT?

GEORGINA - The Advocate has learned the Georgina Township has received a letter from the Ontario Humane Society stating they will cease their animal control services to the Township at the end of December 31, 1980.

Wayne Woods, Township Administrator told the Advocate that 'if we have received a letter then I will be reporting on to council following my investigation of it'.

It was only in December, 1979 that the Ontario Humane Society took over the animal control services for the western portion of the Township. On April 1, 1980 they took over the remaining eastern portion of the Township.

As part of the agreement between the Township and the Humane Society the building and all of the equipment inside of it remained the property of the Township.

The vehicle that had been used by the Township for its animal control work has been transferred to another department in the Township.

The Ontario Humane Society Office in Georgina was contacted but no one would comment. The Ontario Humane Society's main office was also contacted but no comment was made on the subject."

7. In his examination in chief by counsel for the complainant, Mr. Johnston testified that he received several telephone calls on September 29, 1980 and wrote the story quoted

above from the information received through those calls. It was his evidence that prior to the calls, he was not planning any articles on the respondent and had no idea that the respondent was “quitting”. After questioning Mr. Johnston concerning his attempts to confirm the story, counsel for the complainant asked the following questions and received the following responses:

Q: You said you received “several calls”. How many calls is “several”?

A: I received two phone calls.

Q: Who were they?

A: I prefer not to divulge their names. We’re a small weekly newspaper. I must respectfully not reply to this. I must protect my sources.

Q: There’s no privilege of the press. You’re here under subpoena. You’re not volunteering it. I ask you again who they were.

[The Board directed the witness to answer the question.]

A: I’m sorry sir. I’ll respectfully decline to answer the question. I mean no disrespect to the Board by this.

8. Counsel for the complainant then requested and was granted a brief recess to consider his position. When the hearing resumed, the Board heard the submissions of counsel for the complainant and afforded the witness, who had discussed the matter with his employer’s solicitor, an opportunity to respond.

9. A court or administrative tribunal can compel a journalist to reveal his sources of information for a particular story where the identify of his informants is relevant to an issue before it. The jurisprudence on this point is aptly summarized in the following passage from Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 211:

“It has long been established that neither in Canada nor in England is there any privilege relating to a newsman’s sources of information.”

(See also Volume 2 of Schiff, *Evidence in the Litigation Process* (Toronto: Carswell, 1978) at 1010; J. Buzzard et al., ed., *Phipson on Evidence* (12th ed. London: Sweet and Maxwell, 1976) at 243; Cross, *Evidence* (3rd ed. London: Butterworths, 1967) at 244 and Nokes, *Cockle’s Cases and Statutes on Evidence* (11th ed. London: Sweet & Maxwell, 1970) at 108.) The rationale for this legal principle was explained in the following passage from the judgment of Sir Owen Dixon in *McGuinness v. A.G. of Victoria* (1940), 63 C.L.R. 73, at 102 (High Court of Australia), which was quoted with approval by Lord Parker C.J. in *Attorney-General v. Clough*, [1963] 1 All E.R. 420, at 427 (Q.B. Div.) and by Sheppard J.A. in *McConachy v. Times Publishers Ltd.* (1964), 49 D.L.R. (2d) 349, at 358 (B.C.C.A.):

“No one doubts that editors and journalists are at times made the repositories of special confidences which, from motives of interest as well

as of honour, they would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege [such as husband and wife, attorney and client]... an inflexible rule was established that no obligation of honour, no duties of non-disclosure, arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box."

(See also *Attorney-General v. Mulholland*, [1963] 1 All E.R. 767, in which the Court of Appeal upheld the sentences of six months and three months respectively which Gorman J. had passed on two reporters who refused to reveal to a tribunal of inquiry (which was inquiring into certain matters which the British Parliament had required to be investigated) their sources of information for articles which they had written germane to the subject matter of the inquiry.)

10. Section 92(2) of *The Labour Relations Act* provides in part as follows:

"Without limiting the generality of subsection 1, the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases . . ."

Section 12, 13 and 15 of *The Statutory Powers Procedure Act, 1971*, S.O. 1970, c. 47, provide in part as follows:

"12.-(1) A tribunal may require any person, including a party, by summons,

- (a) to give evidence on oath or affirmation at a hearing; and
- (b) to produce in evidence at a hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceedings and admissible at a hearing.

...

13. Where any person without lawful excuse, . . .

- (b) being in attendance as a witness at a hearing, refuses . . . to answer any question to which the tribunal may legally require an answer . . .

the tribunal may, of its own motion or on application of a party to the proceedings, state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the tribunal or by such party, inquire into the matter and , after hearing any witness who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

15.-(1) Subject to subsections 2 and 3, a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,

- (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
- (b) that is inadmissible by the statute under which the proceedings arise or any other statute.

(3) Nothing in subsection 1 overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.”

11. The Board considers that it is requisite to the full investigation and consideration of the matters in issue in this complaint that Mr. Johnston answer the aforementioned question put to him by counsel for the complainant concerning his sources for the article quoted above. The identity of those sources is clearly relevant to the factual issue of whether “on or about Wednesday, October 1, 1980, the respondent caused to be published in a local paper, namely, The Georgina Advocate, that the respondent was not renewing its contract with the Township of Georgina”, as alleged in paragraph xv of the complainant’s statement of particulars set forth above. (Indeed, Mr. Johnston’s testimony may well constitute the only effective manner in which that allegation could be proved since it is certainly not realistic to expect counsel for the complainant to subpoena every officer and agent of the respondent and every person employed by the respondent in managerial or supervisory capacities, in order to ask them whether they directly or indirectly caused the aforementioned article to be published in The

Georgina Advocate.) Thus, it is proper and necessary that the question be answered by Mr. Johnston as the factual issue to which it pertains is relevant to the legal issue of whether the respondent has violated sections 56, 58 and 61 which provide as follows:

“56. No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support of a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

58. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

- (a) shall refuse to employ or continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

61. No person, trade union or employers’ organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers’ organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.”

That factual issue might also be relevant to the legal issue of whether the respondent has violated section 14 of the Act, which provides:

“14. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.”

12. Accordingly, at the hearing the Board made an oral ruling that the answer to the question put to Mr. Johnston was relevant and admissible, and that Mr. Johnston could be compelled to answer it. In so ruling, the Board explained to Mr. Johnston that there is no privilege under the law of Ontario which permits a journalist to refuse to reveal to the Board his sources for a particular story where such information is relevant to an issue in proceedings before the Board. The Board further explained to the witness that by refusing to obey the Board's order that he answer the question, he exposed himself to contempt proceedings under section 13, of *The Statutory Powers Procedure Act, 1971*, which could result in his imprisonment.

13. Mr. Johnston, who it may be noted was polite and courteous at all times in his responses to the Board and to counsel, then stated:

"I'm not prepared to answer the question. I don't wish any disrespect to the Board or its hearing. My job is in a small community. Our job would be much harder if we begin revealing our sources."

14. The hearing was then recessed at 12:20 p.m. to resume at 1:30 p.m. Prior to the recess, the Board suggested to Mr. Johnston that it might be advisable for him to consult further with his employer's solicitor with respect to the matter during the recess.

15. When the hearing resumed, the Board asked Mr. Johnston if his position had changed and he indicated that it had not. The question set forth above was then put to Mr. Johnston again and the Board ordered him to answer it. He refused to do so and thereby breached an order of the Board.

16. Counsel for the complainant request the Board to initiate contempt proceedings forthwith against Mr. Johnston. He further indicated that if the Board declined to apply to the Divisional Court on its own motion with a view to having the witness punished for contempt, the complainant would itself make such application forthwith.

17. Pursuant to section 13 of *The Statutory Powers Procedure Act, 1971*, the Board, on application by the complainant consents to state a case to the Divisional Court with respect to the punishment appropriate in light of Mr. Johnston's contempt in the face of the tribunal (see *Extendicare Ltd., North York*, [1979] OLRB Rep. July 641) so that the Court may, on application by the complainant, determine the matter in accordance with that section.

18. Counsel for the complainant and counsel for the respondent agreed that under the circumstances, further examination of Mr. Johnston should be deferred pending disposition of the application to the Divisional Court for punishment of the witness for contempt, which application counsel for the complainant undertook to make in relation to the case to be stated by the Board. On the agreement of the parties, the Board heard the evidence of one other witness who had been subpoenaed by the complainant and then adjourned the hearing *sine die*.

**1587-80-U;1588-80-U Christian Labour Association of Canada,
Complainant, v. Oxford Manor Rest Home, Respondent**

Change in working conditions – Whether purchaser of business bound by notice to bargain given to vendor – Whether section 70 applicable following sale – Whether new notice necessary to trigger new section 70 freeze

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members W. G. Donnelly and M. J. Fenwick.

***APPEARANCES:** John Kamphof and Henk de Zoete for the complainant; James E. Bowden and Mrs. M. Fernandez for the respondent.*

DECISION OF THE BOARD; December 5, 1980

1. Upon agreement of the parties, the Board ordered consolidation of the above files.
2. The complainant alleges contravention of section 70(1) of the Act in the October 15, 1980 lay-off of Dawn Wayne, Lori Pearson and Kim Ellis by the respondent; and in the transfer to a different job classification on October 15, 1980 of Joanne Granger by the respondent. The complainant insofar as it affects Allan Brearly was withdrawn at the hearing.
3. On August 5, 1980, the complainant union was certified as bargaining agent for separate units of full-time and part-time employees of Caressant Care Nursing Home of Canada Limited operating as Caressant Care Rest Home, and on August 11, 1980 notice to bargain was served on Caressant. On October 8, 1980, a sale of business was effected by Caressant to the respondent: the respondent at the outset of this proceeding conceded that this transaction was a sale of business within the meaning of section 55 of the Act and that whatever rights are thereby transferred to the complainant are effective. It was agreed that the complainant was informed of a sale having been effected by the respondent's solicitor by telegram on October 9, 1980. The sole shareholders of the respondent are Mr. & Mrs. Fernandez and part of their motivation in purchasing the business was to provide the opportunity for themselves and members of their immediate family to work in the business. Mrs. Fernandez states that she was notified, in writing, by the vendor prior to October 8, 1980 of the complainant's status as bargaining agent. All former employees of Caressant became employees of the respondent as of October 8, 1980, and three of them were laid off on October 15, 1980, and the work done by them has since been performed by one of the owner-operators, Mrs. Melva Fernandez. It should be noted that the working hours of the grievor Pearson averaged 12 hours per week, those of the grievor Wayne averaged 27 hours per week. No evidence was received regarding the hours of the grievor Ellis, who is classified as a student. The written notice of lay-off provided to each of the three employees undertook to recall such employees as work became available with the added caveat that "the Home reserves the right to employ members of my immediate family in preference to those on lay-off". Mrs Fernandez explained that at the present she is working at the Rest Home and that her husband does maintenance work there on the weekends; and that she also has two daughters, not now living at home, intended to be covered by the foregoing statement and that "that was part of the reason for buying in the first place".

4. The lay-offs were conducted in order of seniority giving employees credit for their service with the previous employer and taking into consideration merit and ability. The only person retained out of seniority occupied the position of day cook and it was uncontradicted that the job required a one-week training period. Prior to hiring the present incumbent, two of the complaints had been offered the opportunity to train for the job and refused. In addition, the opportunity had been also offered to all other employees except for three who were students, one who had indicated a preference for the mid-night shift and one who it was understood was unavailable for the hours required.

5. Apart from the three grievors who were laid off, the remaining grievor, Joanne Granger, who had been employed as a Nurses' Aide was offered and accepted a transfer to the housekeeping department as an alternative to being laid off. Granger, as a Nurses' Aide, had been employed 22 hours per week and in her new position is employed 18 hours per week without any change in rate of pay.

6. All of the lay-off decisions were made by Mrs. Fernandez who consulted with the Director of Nursing, Mrs. Brearly, in respect to each employee's work experience and ability.

7. On October 27, 1980, the applicant received a letter communication from the respondent, identifying for the first time, the respondent as being the new owner and on October 28th the applicant served notice to bargain on the respondent.

8. The first issue to be determined by the Board is whether in the present circumstances section 70(1) of the Act was effective to preclude any alteration of the terms and conditions of employment by the respondent as of October 15, 1980 at which time the lay-offs were effected. A condition precedent to section 70(1) becoming effective in a given situation is that "notice has been given under section 13 or section 45" of the Act. It is clear that the complainant in the instant case had served no notice to bargain on the respondent as of October 15, 1980. It is also clear that following its certification, the complainant served notice to bargain on the then employer as of August 11, 1980. Consequently, section 70(1) was called into operation as of August 11th and effectively precluded, amongst others, changes in terms and conditions of employment from that date onwards. The question then before the Board is whether section 55 of the Act in some manner extends and continues "the freeze" in effect immediately prior to the sale in such a way that the present respondent was bound on the critical date of October 15, 1980.

9. Section 55(3) is the relevant section in this regard and it reads:

"Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires."

In essence the trade union, such as in the instant case, continues "to be the bargaining agent for the employees of the person to whom the business was sold" and "is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement". Nothing in the section explicitly puts the new employer into the shoes of the previous employer so as to make all the rights and obligations relating to the collective bargaining relationship automatically attach to the new employer. The fact that the Legislature has specifically set out that the trade union shall continue to be the bargaining agent and shall have the right to serve notice to bargain on the new employer, militates against there being any additional rights or privileges from any notice to bargain which may have been served on the previous employer. This view is further fortified by an examination of section 55(2) which, in dealing with a sale of business while an application for certification or termination is before the Board provides, "... person to whom the business has been sold is ... the employer for the purposes of the application as if he were named as the employer in the application." In this latter case where the Legislature intended that the new employer should fit precisely into the shoes of the previous employer it has explicitly said so. Had the Legislature similarly intended in section 55(3) we have no doubt it would have so said. Such a conclusion, in our view, is well within the rationale of the Board's decision in the case of *Hamilton Cotton Company*, [1964] OLRB Rep. July 190.

10. In our view, the notice to bargain served on the previous employer on August 11, 1980 effectively continued in effect the provisions of section 70(1) insofar as the then employer, up to the time of the sale of business, and the notice of October 28, 1980 similarly brought section 70(1) into operation on that date insofar as the respondent is concerned. During the period between October 8, 1980 when the sale was made and on October 28, 1980 when notice was served on the respondent section 70(1) was not operative. It, therefore, follows that if the lay-off of employees in order to provide work opportunity to Mrs. Fernandez constituted an alteration in terms and conditions of employment (on which we express no opinion) it was not a change in contravention of section 70(1) of the Act.

11. The complaint is accordingly dismissed.

0161-79-R;0348-79U Labourer's International Union of North America, Local 183, Applicant, v. **PHI International Inc.**, Farlo Associates Ltd., and East River Construction Limited, Respondents

Certification – Construction Industry – Evidence – Whether employees working in construction industry – Evidence relating to employment equivocal – Duty to adduce evidence at examiner's hearing – Whether Board calling witness – Failure of employer to call witness

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members O. Hodges and E. C. Went.

***APPEARANCES:** B. Fishbein and L. Castaldo for the applicant; A.M. Minsky and L. Castaldo for the complainant; G.J. Smith, Q.C., Jack D. Winberg and G. Farantatos for PHI International Inc. and East River Construction Limited ; W.J. McNaughton, M. Brodigan and J.K. Guidolin for Farlo Associates Ltd..*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN AND BOARD MEMBER E. C. WENT; December 15, 1980

1. The style of cause in this matter is hereby amended to reflect the addition of Farlo Associates Limited and East River Construction Limited as respondents in these proceedings.

2. This is an application for certification which is accompanied by a related complaint under section 79 of *The Labour Relations Act* and a request for a declaration that the respondents are one employer for the purposes of the Act. There are a number of issues in dispute between the parties. In order to understand the way in which these matters have developed, it may be useful to briefly review the course of proceedings to date.

3. On April 25, 1979, the applicant applied for certification as the bargaining agent for the employees of the respondent PHI, employed as labourers in residential construction. On May 3, 1979, PHI filed a reply indicating that there were 9 labourers affected by this application, but contending that they were employed by an unidentified independent contractor and not by PHI. The certification application came on for a hearing on May 14, 1979. At that hearing, counsel for PHI asserted that an entity known as "Farlo Engineering" was the true employer of the employees affected by the application. It was also suggested by the applicant that an entity known as East River Construction Limited might be affected by the application. By a decision dated May 14, 1979, the Board decided to adjourn the application so that these other potentially interested parties might be joined as respondents. In a letter dated May 17, 1979, the applicant indicated that it was uncertain as to the identity of the employer, but that in any event, it would agree that all three companies, or some combination of them, were engaged in related activities under common control and direction and that pursuant to section 1(4) they were "one employer" for the purposes of the Act.

4. On June 19, 1979, Farlo filed its own reply indicating that there were 13 employees employed in the bargaining unit. A further hearing was scheduled for June 29, 1979 to hear the parties' evidence and representation with respect to the outstanding matters in dispute. At that hearing, Farlo took the position that it was the employer for the purposes of the certification application, but not for the purposes of the complaint of a breach of the Act. Farlo submitted that another individual (then unidentified) was the employer of the employees for the purposes

of the section 79 complaint. Subsequently, this individual was identified as one Mike Proestas. The parties were able to reach agreement on the description of the bargaining unit, but it was evident that there was a dispute between them as to the number of employees in the bargaining unit, and the parties advised the Board that it might expedite matters and make it unnecessary to pursue the application under section 1(4) if the employee list could be settled. Accordingly, the Board appointed a labour relations officer to inquire into the employer's list and the composition of the bargaining unit and, at the end of the day, after hearing some evidence, adjourned the section 1(4) aspect of the proceeding pending a resolution of this issue.

5. There followed an exchange of correspondence between the labour relations officer and the parties in which the officer sought to arrange mutually satisfactory hearing dates and secure from the respondent(s) employment records which would substantiate the claim that the employee list should include 13 individuals. The union argued that there were only 8 persons properly on the list, and challenged the inclusion of the other 5 on the grounds that they were:

- a) not employed or not at work on the day of the application,
- b) not employees of the respondent,
- c) not employed as labourers,
- d) not employed in construction work.

The officer convened a series of meetings to entertain the submissions of the parties with respect to these issues. Only the union and Farlo took active part in these meetings although PHI was also present and was represented by counsel.

6. The names of the five challenged individuals are as follows: Anthony DiLabio, Tony Ponte, S. Laber, B. Malinowski and M. Zalas. Counsel for Farlo initially advised the officer that only Ponte could be produced for examination because the company had no record of the whereabouts of the other four employees, and no employment records other than certain cheques and related documents to which we will refer *infra*. The union had no knowledge of any of these individuals, whom, it would appear, were working at sites other than the ones where the union supporters worked. The union denied that any of them were employees in the bargaining unit as at April 25, 1979 the date of the certification application.

7. After several requests Farlo produced an address for Anthony DiLabio, who subsequently answered a subpoena served at that address. DiLabio's address and telephone number are included on the *PHI* personnel records which were filed on behalf of most of the employees on the employer's list; and it is not clear why his address, at least, could not have been produced earlier. In any event, Ponte and DiLabio were eventually produced for examination before the labour relations officer, along with what counsel for the respondent Farlo submitted were all of the employment records relating to all of the employees in the bargaining unit - including the five challenged individuals.

8. The two persons produced were duly examined and cross-examined. At the end of these examinations, counsel for the respondent Farlo indicated that he had a further (unidentified) managerial person who might be in a position to give evidence with respect to

the matters at issue; but he declined to identify or call such individual, asserting that it was the "Board's inquiry" and that therefore, it should be the Board, and not the respondent(s), which should procure the evidence of the individual in question. The Board officer, of course, had no knowledge of the identity of the subject individual, nor his position with PHI or Farlo, nor the nature of the evidence which he might give. All of these matters were within the exclusive knowledge of one or both of the respondents. In the circumstances, the Board officer ruled that he would not call the unidentified management person, but that the respondents would be fully entitled to call him, as well as any other evidence which they wished to lead concerning the matters in dispute. At this point, Farlo took the position that it would not call the management person, but purported to reserve its right to do so, if the Board upheld the officer's ruling. The reason for taking this position is difficult to discern, for the witness was readily available, and, having regard to the relative informality of the proceedings before an officer, the respondent(s) would not have been prejudiced if the evidence had been tendered. Indeed it is difficult to resist the conclusion (urged by the applicant) that the purpose of the respondent(s) was merely to bifurcate and delay the proceedings. The officer completed his report, together with the exhibits filed and the submissions of the parties, and submitted it to the parties for their comment. A further hearing was then scheduled so that the parties could make representations with respect to the labour relations officer's report and all other outstanding issues. This hearing was scheduled for September 2, 1980, and at the hearing, the parties repeated the submissions which they had made before the officer.

9. At the hearing of September 2, 1980, the union reviewed the course of proceedings, its alleged difficulties in obtaining employment records or other confirmatory evidence of the status of the challenged employees, and what it characterized as the respondent's wilful obstruction of the proceedings. It was admitted, moreover, that in respect of the five challenged individuals whom the respondent claims were "casual" employees, the documentary evidence is sketchy and makes it very difficult to reach any conclusion concerning their employer or their status. There are no income tax or unemployment insurance documents, employee payroll records, separation certificates, etc. of the kind normally available for employees - which, counsel explained, by the casual and short term basis upon which the individuals were employed. The union asserted that it had no information with respect to any of these individuals and if, as the respondent(s) asserted, there were witnesses, or evidence within their knowledge and control which might shed light on the matters in dispute, it was incumbent upon them to call it or risk the possibility of an adverse inference. The union urged the Board to uphold the officer's ruling, and argued further that the Board should not now hear any more evidence and, in particular, the testimony of the unidentified witness. He had been available to give evidence before the officer but the respondent(s) declined to identify or call him at that time - a position which was characterized by the applicant as but another attempt to delay the proceedings. The applicant argued that the respondents had been given a full opportunity to present their evidence, and having chosen not to call the witness, were foreclosed from doing so now. The respondent argued, in reply, that the unidentified witness should have been called as a "Board witness" and that in the alternative, if the Board chose to uphold the officer's ruling, the respondent should be given the opportunity to call the witness before the Board itself. The respondent advised that the witness was then in the hearing room and available for examination.

10. During a certification proceeding a question often arises concerning the status of an individual claimed to be an employee in the bargaining unit. The practice of the Board in such

cases is to appoint a labour relations officer pursuant to section 92 of *The Labour Relations Act* to inquire into that issue. Frequently, all that will be necessary is a check of the employer's records which will usually contain sufficient information to resolve the question. If the records are inadequate or do not provide enough information on the particular issue in dispute (for example whether a person is "managerial" or employed in a particular capacity) the person can be examined directly. If the individual is not currently employed by the employer, and is not, therefore, readily available to the parties the Board will normally issue a subpoena so that he can be present for examination. As a convenience to the parties, this subpoena will generally be served by an employee of the Board. Likewise, when an individual has been subpoenaed, the Board officer will generally begin the inquiry by asking a number of fairly standard questions which in most circumstances will throw some light on the employee's status. When the questioning is completed, the parties are then permitted to cross-examine the witness, as well as call such other evidence as they consider relevant to the matter in dispute. The employee status question remains an issue in dispute between the parties, but the officer will usually conduct this preliminary inquiry, and then leave it to the parties to fill out the evidence as they deem necessary. That evidence, of course, must be relevant to the issues in dispute, and the officer may occasionally find it necessary to limit an examination which is unduly repetitious or involves extraneous matters. In this way, the officer is controlling the proceeding before him in much the same way as the Board would.

11. This procedure has proved useful over the years in accomplishing an expeditious resolution of employee status disputes; but it does not relieve the parties of all responsibility for adducing evidence in support of their respective positions, nor does it shift that responsibility to the Board. It is the parties themselves who are in the best position to understand the business or factual context in which the employee status dispute arises, and it is the parties, therefore, who must bear the primary burden of adducing evidence to support their positions, or risk the possibility that if they do not lead such evidence, the Board will draw inferences adverse to their position from the evidence which is available. We do not think the officer has any obligation to "call" *any* evidence or ask *any* particular questions although frequently he will do so in order to clarify and expedite matters, and ensure that relevant evidence is before the Board. Certainly, he has no obligation to conduct an examination of a witness of which he knows nothing whatsoever. The present circumstances provide a case in point, for here, neither the union, nor the Board officer, had any knowledge of the background of the witness, or the evidence which the respondent Farlo claimed might be material. These facts were exclusively within the knowledge of the respondent itself, and in our view it was entirely appropriate for the officer to turn to the respondent to call that evidence.

12. The Board, by majority, upheld the officer's ruling and affirmed that since the identity of the witness and his evidence were entirely within the knowledge of the respondent, it was the respondent, not the Board which should call him. The fact that as a convenience to the parties, and in order to expedite matters, a Board employee endeavors to effect service of a subpoena, and a Board officer addresses preliminary questions to the witness does not make the individual a "Board witness" or create any obligation to call him. Moreover, in the ordinary course, a respondent who fails to call a witness before an officer will not be given a second opportunity to call this evidence before the Board. If it fails to call all of its evidence when given an opportunity to do so, it cannot be heard to complain if the Board later makes an adverse finding on the evidence which is available. On the other hand, in the circumstances of this case, the Board, by a majority, rejected the union's contention that the evidence should not be entertained at all. The witness was readily available, his evidence would not be protracted,

and in view of the inadequacy of the other viva voce and documentary, it appeared as if this evidence might be helpful in resolving the issues before us. While the applicant may well have been prejudiced by the procedural wrangling preceding the hearing, we did not think that hearing the witness would contribute to that prejudice, and the evidence of the witness might well assist the Board in resolving the issues before it. Accordingly the Board ruled that it would hear the evidence of the witness (who was still unidentified) and thereafter entertain the parties' submissions with respect to the union's challenges — having regard to the evidence in the officer's report, and the viva voce evidence of the respondent's witness. The evidence in the officer's report includes a transcript of the viva voce evidence of Tony Ponte and Anthony DiLabio, as well as certain documents which the respondents submit demonstrate or explain the status of the five challenged individuals.

13 Ponte testified that he was employed to do general repair, maintenance and clean-up on the "159 Townhouse — Mississauga Meadows Project." His time sheet for the week ending April 28, 1979 confirms that he was employed throughout that week doing a number of minor jobs in and about the condominium units. Some of the units had then been sold, and others had been completed and were awaiting either final decoration or sale. Ponte's job involved cleaning the garages and basements of the houses recently built, cleaning the floors prior to laying of the carpet by a subcontractor, and doing minor repair work on cupboards, lighting fixtures, entrance ways, steps, tiles and so on. As Ponte explained it, he was to "clean up the mess left from the construction", do any minor repairs which were necessary prior to the units being sold, and respond to the complaints of minor construction defects. DiLabio performed similar functions and, like Ponte, his time sheet confirms that he was employed on the application date at the "Mississauga Meadows — 159 Townhouse Project". DiLabio also did minor repairs prior to, or shortly after, the sale of the units. He repaired locks, adjusted windows which were not properly fitted, did clean up work generally and in preparation for the laying of carpet, checked screens, and patched minor cracks in the walls. It is clear that the functions of both of these employees were closely connected with the construction project, and can either be characterized as part of the finishing or decorating phase, or alternatively, as the repair of equipment or fixtures which were defective or improperly installed. In either case, we are satisfied that the employees' functions are properly characterized as construction labourer's work.

14. There is much more uncertainty concerning the identity of their employer. Ponte testified that he understood himself to be working for Farlo although after the first couple of weeks he said he was paid by cheques emanating from PHI. He testified that as late as the date of the examination, he still considered himself to be working for Farlo; but that firm's name does not appear on any of the documents respecting any of the employees, and there were no income tax, unemployment insurance or other "official documentation" respecting Ponte. Bruno Orticello was identified as a construction supervisor with Farlo and Ponte believed that G. L. Guidolin, the President of Farlo, could discipline or discharge him. However, Ponte also indicated that Michael Brodigan worked for PHI, while in the evidence adduced before the Board on June 29, Mr. Brodigan himself testified that he was an assistant to G. L. Guidolin. The "Remittance Advice" document recording Ponte's overtime at the Mississauga Meadows Project and a cheque (numbered 7505) payable to Ponte in respect of such overtime both indicate a direct payment from PHI to Ponte for services rendered. Similar documents were filed for the eight construction labourers whose status as such the union has not challenged. These remittance advice documents also bear the name of PHI, and indicate a cheque number and payment to the order of the employees. In addition, for Ponte, DiLabio and the unchal-

lenged employees, there are corresponding personnel records entitled "personnel change notice" and bearing the name PHI, and various items of personal information concerning each employee. There is no mention of the name Farlo.

15. DiLabio's evidence was equally equivocal. His pay cheques and time statements took the same form as those of Ponte and, like Ponte, he indicated that he had been hired and supervised by Bruno Orticello as well as an individual named Tony Pellegrin. Orticello delivered his cheques, however, he described Orticello as a general supervisor for PHI. Orticello himself did not give evidence, nor did Pellegrin. DiLabio also testified that he had filled in a TD-1 income tax form, and filled in his social insurance number on some company document. No tax documents were produced, and the only document with DiLabio's social insurance number is the personnel record mentioned above with the name of "PHI Property Management" and the PHI International Inc. logo. DiLabio said he had never heard of Farlo Engineering. He believed that he worked for PHI. No one told him he worked for Farlo — although it seems that he worked with Ponte on at least one occasion, and it is admitted that the two companies do share the same location and have a close business relationship. DiLabio's perception was that PHI occupied two floors at 160 Dundas Street with the "senior bosses" on the upper floor, and the payroll department downstairs.

16. The evidence respecting M. Zalas, B. Malinowski and S. Laber is even less satisfactory and consists of the viva voce evidence of Mario Pikula, a supervisor of Farlo who allegedly hired them, together with certain documents concerning their work and the payment. Before turning to the viva voce evidence, it will be convenient to refer briefly to the documentary evidence.

17. For these three individuals there are not even the minimal employment records which are available for Ponte, DiLabio and the other employees on the list. There are no unemployment insurance records, TD-1 forms or separation certificates. There is only an unsigned typewritten document dated April 25, 1979 indicating that work was done by the three persons at 220 and 230 Woolner Road. However, although this document was produced, no one from the respondent(s) came forward to explain what it was, whether it is the kind of document which is kept in the ordinary course of business, whether this is the way the respondent(s) document casual labourers, why the space for a signature is not filled in, who prepared the document, who keeps documents of this kind and from what record or sequence of records it has been extracted. All of these things might have been of some assistance to the Board in determining what weight to be ascribed to this document. As it is, in the absence of such information, the Board is satisfied it should give this particular document no weight.

18. The other documents produced in respect of these three employees were likewise unidentified but, contained certain information which, arguably, speaks for itself. The cheques bear the name of PHI International, are dated April 27, 1979, and are drawn on the bank of Nova Scotia at 165 Dundas Street West, Mississauga (the address of both PHI and Farlo). Typed on each cheque is the phrase "re: clean all areas and repair to garage door". The cheque also bears the printed words "Yellow Sun in trust 220 Woolner". The cheques appear to be signed by Vy Nesdale who, the Board was advised on June 29, 1980, is a bookkeeper employed by, and working 98 per cent of the time for, PHI, but doing occasional work for Farlo. Ms. Nesdale was described as the secretary-treasurer of Farlo although she holds her one share in trust for Mr. Guidolin, its president. The other signature for whom Ms. Nesdale is apparently signing was not identified. The respondent led no evidence in this regard.

19. At best, these cheques indicate that three employees were paid the sum of \$56.00 on April 27. They do not demonstrate that they were employed on April 25, the application date, nor can one conclude that the words "re: clean all areas and repair to garage door" mean that the employees performed work properly characterized as being in the construction industry. While the definition of construction in section 1(f) of the Act includes the word "repair", we do not think that every minor clean up or maintenance job in or about a long completed building can be regarded as work within the construction industry. If such were the case, resident superintendents of apartment buildings could be characterized as construction labourers. We do not think that the document is very helpful in resolving the character of the employee's work; however, in this respect, the evidence of Mr. Pikula was more enlightening.

20. Pikula told the Board that he had arranged for a subcontractor to install architectural block in the lobby at 220 - 230 Woolner Road, but after making these arrangements was subsequently told by the contractor that the dry wall would have to be removed before he could start. Pikula had no persons on hand to undertake this task, and went to a restaurant to see if he could find some casual labour. At the restaurant, he met Mr. Malinowski who was told to come the next day with a couple of friends to perform the required work. The individuals were to remove the stripping and dry wall at Woolner Road, and clean the wall underneath. While there, they also performed some general cleaning, and repaired a garage door. The building itself is 12 to 15 years old. The employees performed three days work in all: two days in Hamilton and one in Toronto. The witness could not recall which days they worked in Toronto (and would therefore have been employees in the bargaining unit) and which days they worked in Hamilton. No cheques in respect of the Hamilton work were put before the Board. However, Mr. Pikula twice testified that he recalled giving the employees the above mentioned cheques *on the day that they performed the work*. If Mr. Pikula is correct in his recollection, and if the cheques were issued on April 27, as indicated, then the individuals would not have been employees in the bargaining unit on the date of the application. Mr. Pikula's recollection however was hazy, and he candidly admitted that, but for the typed, unidentified, and unsigned document indicating that the employees had worked on April 25, he would have no clear memory of the event. He explained that his practice was to write out a memorandum to the secretary explaining what the employees had done, and designating what they should be paid, but he could not recall precisely when this had been done. No such memorandum was produced. The person preparing or authorizing the cheques did not give evidence nor, as we have already mentioned, was the sequence of cheques produced (which might have pinpointed the date the work was done or given some indication of the dates that work was done in Hamilton). In the result, we are left with no evidence other than the respondent's assertion that the three casual employees were employed in the bargaining unit on April 25, 1979; and the viva voce evidence of Mr. Pikula, together with the cheques suggests the contrary. The applicant union, of course, has no knowledge of any of these relationships, and asserts that in circumstances it is the respondent employer(s) which must satisfy the Board that the employees are properly included on the list. An employer's employment relationships are matters entirely within its own knowledge and, in the union's submission, if an employer puts forward a list of employees said to be in the bargaining unit, it must be able to affirmatively demonstrate that this is the case.

21. On an application for certification, the Board is required to ascertain both the number of employees in the bargaining unit employed on the application date, and the number of employees who were members of the union on the "terminal date" fixed pursuant to section 92(2)(j) of the Act. An employer is required to file, in Form 51, a list of his employees. This list

must be prepared under the instruction of a responsible company official who signs the list to verify its accuracy. In determining the number of employees in the bargaining unit the Board places primary reliance on this material, for the number and nature of an employer's employment relationships are matters which are often within its exclusive knowledge. The trade union seldom has detailed information in this regard, even though its right to certification will ultimately turn on establishing majority support among these employees. This is especially so in the construction industry where employment relationships are transitory, employment levels can fluctuate on a day-to-day basis, and an employer may be engaged on a number independent and geographically separate construction sites. Unless there is an interchange of employees, or functional interdependence among construction sites, the union may not have specific knowledge of the employer's employee complement. In these circumstances, we do not think it is unreasonable to require an employer to come forward and substantiate its claim that certain individuals were, indeed, "employees" on the application date. Frequently, a simple check of the employer's records will be all that is required. Sometimes, it may be necessary to entertain oral evidence. In either case, however, we are satisfied that when an employer submits a list of individuals whom it claims are employees in the bargaining unit on the application date, it must be prepared to come forward, if challenged, and demonstrate that its list is accurate.

22. In the case of Zalas, Malinowski, and Laber, the employer is asserting the existence of an employment relationship on April 25, 1979; but there are none of the usual documents available to support such claim, nor are the documents which are available similar to those available in respect of the other employees. While it would be tempting to explain this difference by reference to the casual nature of the individuals' employment, it might be noted that DiLabio was also employed on a casual basis, working only a few days, and there was fuller documentation in his case. We are satisfied that the work done by the three challenged persons, in preparation for the arrival of a masonry subcontractor is construction work; but we are not satisfied on the basis of the evidence before us that they were employed by the employer to do that work on the application date. In the result, therefore, the Board is satisfied that insofar as the character of the challenged employees' work is concerned, Ponte and DiLabio are properly regarded as construction labourers employed on the application date, and the other three challenged individuals cannot be regarded as employees on the application date. Accordingly, the names of Zalas, Malinowski and Laber should not be included on the list of employees.

23. We do not think it necessary at this stage of the proceeding to decide precisely who is the employer of Ponte and DiLabio. As we have already pointed out, the evidence in this regard is equivocal, although, on balance the evidence suggests an employment relationship with PHI which bears the burden of remuneration. However, this issue is closely connected to the status of the other eight individuals affected by this application (whom the applicant contends were employed by one or some combination of the respondents but about whom the officer did not enquire) and also to the section 1(4) application which, if successful, would make the entire issue academic. The determination of the identity of the "true employer" can often be a difficult one (see for example *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538) and the Board is reluctant to make such determination on a piecemeal basis or further bifurcate these proceedings. Accordingly, the Board has determined that this matter should be relisted for hearing so that the Board can entertain the evidence and submissions of the parties with respect to all outstanding issues — and in particular, the union's application under section 1(4). Since the Board has already begun to hear evidence on the section 1(4) question, we

have decided that the parties should address themselves initially to the remaining evidence with respect to that issue. If it becomes necessary to do so, we will then address the issue of the identity of the employer.

24. The Registrar is directed to relist this matter for hearing. At that hearing the respondents must be prepared to comply with their joint obligation under section 1(5) of the Act to adduce evidence within their knowledge concerning the section 1(4) issue, and if necessary, all other matters in dispute.

DISSENT, IN PART, OF BOARD MEMBER OLIVER HODGES:

I have had the opportunity to read the decision of the majority in this matter and concur with the conclusions which my colleagues have reached. I wish to indicate however, that I could not agree with the majority decision to entertain the evidence of Mr. Pikula, the witness whom the respondent did not identify and refused to call before the Board Officer. In my view this tactic was designed solely for the purpose of delaying the proceedings, and having failed to call its evidence when given an opportunity to do so, the respondent is not entitled to, and should not have been given, a second opportunity.

0958-79-U International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), Complainant, v. **P. J. Wallbank Mfg. Company Ltd.** Respondent.

Damages – Discharge – Duty to mitigate – Calculation of damages

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members C.A. Ballentine and J. A. Ronson.

APPEARANCES: *H. P. Rolph, Jack Pawson, Norman Church and J. Kube for the complainant; A. A. Morscher and A. J. Wallbank for the respondent.*

DECISION OF THE BOARD; December 16, 1980

1. By its decision dated October 23, 1979, the Board found that Mr. Norman Church was discharged for reasons contrary to the Act and ordered that he should be reinstated with full compensation. That order was made in the knowledge that Mr. Church's status was in dispute and would be settled by another panel dealing with the complainant's application for certification, and, of course, was made dependent on the Board's jurisdiction to order reinstatement.

2. On April 30, 1980, the application for certification was granted and the panel of the Board dealing with that determined Mr. Church's status. On August 22, 1980, the present panel issued a further decision reaffirming its decision of October 23, 1979. In both the October 23, 1979 and August 23, 1980 decisions the Board remained seized of the matter for the purposes of assessing compensation should the parties be unable to agree. The parties have

been unable to agree on most aspects of compensation, so the Board will make the assessment.

3. Mr. Church was discharged on or about August 22, 1979 and was reinstated on September 1, 1980. The compensation claimed was set out in a letter to the Board dated September 16, 1980. Although that claim was amended by a subsequent letter to the Board and by agreement of the parties, the particulars set out in that letter are still valid as a listing of the items claimed, and will be used by the Board as a framework for its decision. The items and amounts claimed are as follows:

(a) *Loss of Wages*

It is agreed that the maximum number of working days claimed are 40 for calendar year 1979 and 158 for calendar year 1980. This accounts for the period from the work week beginning October 22, 1979 to the work week beginning August 25, 1980, inclusive. The parties agreed on a detailed statement of the actual working days broken down by weeks, which will be used for reference should the Board determine that there was a failure to mitigate at any time.

The parties have agreed that the wage rate for Mr. Church was \$9.54 per hour in 1979 and would have been raised to \$9.76 per hour as of January 1, 1980. According to the Board's calculation, the amount claimed for loss of wages is:

1979	40 days at \$76.32	= \$ 3,052.80
1980	158 days at \$78.08	= \$12,336.64
	Total Claimed	\$15,389.44

(b) *Vacation Pay and Vacation*

The parties have agreed that Mr. Church will receive one week's vacation in December 1980, and that this 1980 vacation entitlement will thereby be satisfied. The parties agreed that Mr. Church was entitled to four weeks of vacation in each of 1979 and 1980.

(c) *Unemployment Insurance Contributions*

The parties have agreed that the respondent will pay the appropriate sum to the Canada Employment and Immigration Commission as its portion of the contributions for unemployment insurance on behalf of Mr. Church. The amount of that contribution will be dependent upon the Board's determination in relation to wages.

(d) *Canada Pension Plan Contributions*

The parties have agreed that the respondent will pay its portion of the contributions to the Canada Pension Plan on behalf of Mr. Church. The amount will be dependent on the Board's award in relation to wages.

(e) *O.H.I.P.*

The parties are agreed that the respondent will reimburse Mr. Church for O.H.I.P. premiums paid by him between February 1, 1980 and September 1, 1980, subject to the Board's finding as to Mr. Church's duty to mitigate during that period.

(f) *Safety Shoe Allowance*

The respondent has agreed to pay Mr. Church \$15.00 if the Board orders that compensation for lost wages is due to him for 1980.

(g) *Prescription Drugs*

The respondent has agreed to reimburse Mr. Church for the amount paid for prescription drugs during any period which the Board determines if the respondent is liable to him for lost wages.

(h) *Life Insurance*

The parties have agreed that at the time of his discharge Mr. Church had life insurance coverage for \$20,000.00 paid for by the respondent. The parties are agreed that he should continue to receive this coverage, but the respondent wants the Board to make it clear that Mr. Church will be receiving this amount coverage only because he had it at the time of his discharge.

(i) *Pension*

The parties are agreed that Mr. Church could be reinstated into the pension plan. In order to re-establish his pension position at the time of his discharge, the money paid out to him and to the respondent will have to be returned to the insurance company. In addition, money representing contributions from both the respondent and Mr. Church for the period of his unlawful discharge will have to be remitted to the insurance company so that Mr. Church's ultimate pension entitlement will not suffer.

(j) *Christmas Turkey*

The parties have agreed that Mr. Church will receive two turkeys in 1980.

(k) *Registered Letter*

The parties have agreed that Mr. Church will be paid \$1.50 to reimburse him for the amount of a registered letter concerning his reinstatement sent to the respondent.

(l) *Interest*

The complainant has asked that interest at the rate of 12.5% be paid on one-half of the wages claimed from August 22, 1979 to September 2, 1980. The amount of interest claimed, based on the revised wage claim is \$961.84. The respondent did not dispute that interest should be paid.

4. The Board has recently reaffirmed its position that a person who has been discharged has an obligation to take reasonable steps to mitigate his loss (see *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250). In dealing with the common law duty to mitigate in the context of unlawful discharge cases, the Board must also keep in mind that, unlike at common law, a successful complaint almost always results in the reinstatement of the discharged employee. It would be shortsighted indeed to ignore the availability of this remedy and the frequency of its use when determining whether someone has taken reasonable steps to mitigate the loss. In other words, in an action for wrongful dismissal at common law, a discharged employee would be claiming an amount equal to his earnings for the period during which the court determines that he should have had notice of his discharge. He would not be entitled to reinstatement, and therefore has no need or interest to keep himself in a position where he can take up his old job again; on the contrary, his interest lies in picking up the pieces and embarking on a new enterprise as soon as possible. Where reinstatement is available as a remedy, and commonly awarded, it would be unrealistic to ignore that the discharged employee has every reason to believe that he may be returning to his old job. The interpretation of his obligation to mitigate must be considered in light of his obvious interest in keeping himself in a position to resume his former employment.

5. The case at hand also has an unusual aspect, given that October 23, 1979 the parties knew that Mr. Church would be reinstated if his status as an employee under the Act were determined by another panel. On April 30, 1980, Mr. Church's status was established. The Board considers that, as of April 30, 1980, the respondent was under an obligation to reinstate Mr. Church forthwith. The testimony of Mr. Wallbank that he knew, after the April 30th decision was released, that Mr. Church would have to be reinstated, but that he was awaiting the outcome of the judicial review of that decision before acting, is of great significance in assessing the true extent of any confusion about the decision of October 23, 1979. The original objection to jurisdiction was based on the question of employee status. Once it was determined that Mr. Church was an employee, the matter of his reinstatement was finally settled, and one must be somewhat skeptical of the need for clarification of the original order. Accordingly, the Board will not consider that Mr. Church was obliged to mitigate his loss after April 30, 1980, when the respondent knew it was obliged to reinstate him and chose not to do so. From April 30, 1980, to September 1, 1980, the respondent could have diminished its potential liability by fulfilling its obligation and reinstating Mr. Church. Therefore, full compensation will be awarded from April 30th to the date of his reinstatement.

6. For the purposes of examining whether Mr. Church fulfilled his obligation to mitigate, the Board will only consider the period up to April 30, 1980. Based on the evidence, it is accepted that up to the end of 1979 Mr. Church was actively engaged in trying to arrange to buy an interest in a small spring company in Brantford. The arrangement was abandoned on the advice of his bank manager when satisfactory arrangements for control of the business could not be worked out. During this same period, and throughout the relevant period, Mr. Church had registered with Canada Manpower in Woodstock, and was receiving unemployment insurance benefits. The essence of his uncontradicted evidence was that he

sought work generally and regularly in the Woodstock, Paris, Brantford area. He lives in Princeton, which is situated on Highway 2 between Woodstock and Paris. During that same period, the complainant caused inquiries to be made in its Woodstock and Kitchener area locals to determine whether there was a job for Mr. Church.

7. The evidence adduced by the respondent was that throughout the material period there was a chronic shortage of springmakers and that there were springmaking companies within 50 miles of Princeton which would have hired an experienced springmaker, even for a short period of time. None of the complainant's evidence contradicted the bulk of this evidence. It would therefore seem logical to conclude that Mr. Church probably could have had a job as a springmaker in the period between October 22, 1979 and April 29, 1980, had he presented himself to the springmaking companies in the area. It is probable that Mr. Church would have known of the existence of these companies or would have known how to find out where such companies were located. The latter conclusion can be drawn when one considers that Mr. Church had around fifteen years in the springmaking business.

8. On the other hand, there is no doubt that Mr. Church made efforts to find work other than as a springmaker during the period in question. That he was unsuccessful is not surprising when one considers the general economic conditions. It is also clear that Mr. Church registered with Canada Manpower as a springmaker, but was never referred to any springmaking companies, even though everyone concerned with hiring springmakers for those companies testified that he had placed standing orders for springmakers with Canada Manpower.

9. In assessing the evidence in order to determine whether Mr. Church's actions have been unreasonable, the evidence of Mr. Van Hees should be ignored. Mr. Van Hees operates an employment agency which specializes in placing skilled and management personnel. He contacted Mr. Church in late October, after the decision of the Board, to inquire whether Mr. Church was interested in obtaining a job. It is apparent that Mr. Church suspected that Mr. Van Hees had been prompted to contact him by the respondent, and that he was somewhat suspicious of and bitter towards his former employer. Under these circumstances his remarks to Mr. Van Hees, who was given his name by the respondent, cannot be taken at face value. It is not unreasonable for someone in Mr. Church's position to be less than enthusiastic about possible job opportunities presented by a stranger who telephones out of the blue, and is suspected of being an agent of his previous employer.

10. The onus is on the respondent to show, on balance, that Mr. Church failed to take reasonable steps to mitigate his loss. The Board considers that the activities begun by Mr. Church shortly after his discharge and before the outcome of the complaint against the respondent with a view to becoming a partner in a springmaking business were completely reasonable. Moreover, his decision not to go through with the plan on the advice of his bank manager was equally reasonable, and made for apparently valid reasons. During that same period he was also registered with Canada Manpower and was seeking work generally in fields other than springmaking. It is surely not unreasonable to be seeking other non-springmaking alternatives during that time, especially when there was a good chance that he would be able to be in the springmaking business for himself. It is therefore reasonable to conclude that Mr. Church's efforts up to the end of 1979 were both real and reasonable attempts to mitigate the loss.

11. From January 1, 1980 to April 29, 1980, Mr. Church was no longer engaged in attempts to buy into the springmaking business. He was making efforts to find work, but it seems probable that those efforts were not directed toward gaining employment as a springmaker. The respondent has adduced evidence from which it is probable to conclude that there was work available as a springmaker within a 50-mile radius of Mr. Church's home. Although it is probable to conclude that Mr. Church could have found work as a springmaker, one must not ignore the fact that he was making attempts to find other work, that he had registered with Canada Manpower as a springmaker and should be entitled to reply to some extent on that agency to search its information banks for standing orders for springmakers, and that he was at all material times aware of the Board's order that he should be reinstated if he were found to be an employee under the Act. Once that order has been made known, it is not unreasonable for someone to view his re-employment as imminent and to regard himself as looking only for a temporary job. It is not totally unreasonable to seek temporary employment in areas closer to home and in fields other than one's trade. In the instant case, even if the Board were to accept the respondent's assertion that Mr. Church totally failed to fulfill his duty to mitigate, the respondent has adduced no evidence to show what he might have earned as a springmaker during that period.

12. In dealing with an allegation that Mr. Church failed to mitigate his losses during any period, the Board must also keep in mind that the onus on the respondent should not be regarded as a light one, because the situation is one where the party who has breached the Act and acted wrongfully toward the employee is demanding some action from the innocent injured party. (see discussion in *Cheshire and Fifoot's Law of Contract*.) It would seem reasonable, and in keeping with this philosophy, that where the respondent has satisfied the onus of showing that there was no reasonable attempt to mitigate during any period, the approach which should be taken in decreasing the claim should be that taken in *Manning v. Surrey Memorial Hospital Society* (1975), 54 D.L.R. (3d) 312 (B.C.S.C.). In that case the learned judge reduced the claim for compensation for wrongful dismissal by the amount that the evidence showed that the plaintiff would probably have earned if he had acted reasonably during a specific period. In other words, even though the plaintiff's salary was \$2,000 per month, and it was found that he acted unreasonably for three months, his claim for one year's salary in lieu of notice was only reduced by \$1,500 because that was the amount he could probably have earned in the three-month period.

13. In the case at hand, it is reasonable to conclude that Mr. Church did not take all reasonable steps to find a job in his trade from January 1, 1980 to April 29, 1980. Further, it is reasonable to expect him to seek work in his trade, especially when there were, in all probability, springmaking jobs available within a reasonable distance from his home in Princeton. There is no evidence from any source as to what Mr. Church would have made had he acted reasonably in the period January 1, 1980 to April 29, 1980. It is likely that the rates of pay for springmakers vary from employer to employer within a given range; however, the only information the Board has is what he would have made had he been employed by the respondent during the period. The Board does not know how this figure relates to the wages paid by other springmakers in the area. The Board does know and can take notice of the minimum wage rate payable in Ontario. It is further reasonable to assume that a skilled tradesman working in his trade would earn more than the minimum wage. Following the approach set out in paragraph 12 herein, it is probably more reasonable not to permit the respondent to benefit automatically from such an assumption, to the extent that its wage rate is accepted as being the norm for springmakers in the area. The Board is therefore left with the

option of using the minimum wage rate or of arbitrarily setting a more realistic rate somewhere between the minimum wage and the respondent's wage scale. The respondent should probably bear the cost of the Board's uncertainty as to what Mr. Church could have earned in that period.

14. For all of the above reasons the Board orders:

- (a) that the respondent pay to Mr. Church the amount of Eleven Thousand Three Hundred and Eighty Nine Dollars and Forty-Four Cents (\$11,389.44) on account of lost wages. That amount is calculated as follows:

Original claims as per paragraph 3, item (a) <i>supra</i>	\$15,389.44
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LESS:

Amount which probably could have been earned in the period Jan. 1/80 to April 29/80 inclusive	4,000.00
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Balance	\$11,389.44
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- (b) that the respondent conform to its agreement concerning vacations as expressed in paragraph 3, item (b) of this decision;
- (c) that the respondent remit its portion of contributions for Unemployment Insurance and Canada Pension Plan as agreed to in paragraph 3, items (c) and (d) of this decision;
- (d) that the respondent reimburse Mr. Church an amount equal to OHIP payments paid by him between April 30, 1980 and September 1, 1980;
- (e) that the respondent pay Mr. Church Fifteen Dollars (\$15.00) by way of safety shoe allowance;
- (f) that the respondent pay Mr. Church Eighty-Eight Dollars and Fifty-Seven Cents (\$88.57) as reimbursement for prescription drug expenses incurred after April 30, 1980 and before January 1, 1980;
- (g) that the respondent obtain life insurance coverage for Mr. Church in the amount of Twenty Thousand Dollars (\$20,000.00), being the amount of coverage enjoyed by Mr. Church at the time of his discharge;
- (h) that Mr. Church be reinstated into the pension plan in accordance with the terms set out in paragraph 3, item (i) of this decision and that the amounts to be paid into the pension plan by both the respondent and Mr. Church be determined in consultation with the carrier of the plan;

- (i) that the respondent give Mr. Church two turkeys for Christmas 1980;
- (j) that the respondent pay Mr. Church One Dollar and Fifty Cents (\$1.50) by way of compensation for the cost of a registered letter sent to the respondent;
- (k) that the respondent pay Mr. Church the sum of Seven Hundred and Eleven Dollars and Eighty-Four Cents (\$711.84) by way of interest calculated in accordance with paragraph 3, item (1) of this decision.

15. In view of the fact that the parties have agreed that the Canada Employment and Immigration Commission should have returned to it, pursuant to sections 51 and 52 of the *Unemployment Insurance Act* benefits paid to Mr. Church and have agreed that it would be appropriate for the Board to make a direction to the respondent to remit the appropriate amount to the Receiver General for Canada, the Board directs:

- (a) that the respondent ascertain whether an amount would be repayable to the Receiver General for Canada, pursuant to section 51 of the *Unemployment Insurance Act, 1971*, as amended, for all or any part of the period since Mr. Church's discharge; and
 - (b) that the respondent deduct the amount which would be repayable to the Receiver General for Canada from the amount to be paid Mr. Church pursuant to this decision and remit the former amount to the Receiver General For Canada as repayment of an over-payment of benefit.
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2204-79-R Teamster Local Union 132, Chemical Energy and Allied Workers Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouse & Helpers of America, Applicant, v. **PRC Chemical Corporation of Canada Ltd.**, Respondent, v. Group of Employees, Objectors.

Certification – Membership Evidence – Petitions – Whether Petition management supported – Union intimidating employees – Board not satisfied all membership evidence voluntary – Vote ordered

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and D. B. Archer.

APPEARANCES: *Douglas J. Wray and Dennis J. Phillips for the applicant; Brian Burkett, R. E. Henson and B. Dorey for the respondent; C. J. Abbass and Jack Ryan for the objectors.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON: December 10, 1980

1. This is the continuation of an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Metropolitan Toronto, save and except foremen, persons, above the rank of foreman, office and sales staff, persons, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The applicant filed acceptable evidence of membership on behalf of 22 of the 36 employees in the bargaining unit, and would therefore be in a normally certifiable position. There was, however, a timely statement in opposition to this application filed by employees in this matter, with sufficient overlap amongst those employees formerly signing membership cards as would cause the Board, should the statement be found to be voluntary, to exercise its discretion and order the taking of a representation vote. In addition, the respondent employer has filed charges with respect to the manner in which membership cards were obtained, and on that basis as well requests the Board to direct the taking of a representation vote. The Board, accordingly, heard evidence with respect to both of these matters.
5. Two employees, Mr. Ryan and Mr. McCullough, both gave evidence in support of the petition. Mr. Ryan's evidence was given first, with witnesses excluded. His evidence was quite precise, and contained a number of admissions not particularly supportive of the petition. Mr. McCullough, on the other hand, gave evidence on a later date, and was far less precise in his recollection. His evidence placed a gloss on the activities in question which put the petition in a far more favourable light, but which was inconsistent with much of Mr. Ryan's evidence. In the circumstances, the Board finds that it must discount the evidence of Mr. McCullough, and will assess the petition on the basis of the testimony of Mr. Ryan. There are, however, considerable problems raised by the evidence of Mr. Ryan.

6. Mr. Ryan is a truck driver in the bargaining unit, and was not approached to join the union. The posting of the Board's Form 5 (Notice to Employees of an Application for Certification) came as a surprise to him. The employees in the plant were engaged in the taking of inventory at the time that the Form 5 was posted. A number of employees were gathered around the bulletin board reading the Form when Mr. Dorey, one of the managers of the company, came by. Mr. Ryan stopped him and began a heated discussion over the matter of the union entering the plant. Mr. Dorey tried to calm Mr. Ryan down, and suggested that they go to his office. The two of them did so. Mr. Dorey's office is located with the other offices at the front of the building, and to get there the two men were required to walk through the length of the plant. In the office Mr. Dorey told Mr. Ryan that management couldn't help him, and Mr. Ryan returned to the shipping office at the other end of the plant, where he discussed with three other employees who worked there what to do. Mr. Ryan testified that both he and the others, and sometimes Joe McCullough alone, went back to Mr. Dorey's office a number of times that morning to ask for help. He further testified that Mr. Dorey finally, in exasperation, gave them the telephone number of the Labour Board. Mr. McCullough phoned the Labour Board, and the employees in the shipping office then drafted a petition. They removed the Form 5 notice from the bulletin board and took it to the shipping office to assist them. Mr. Ryan then took the handwritten petition to the front office where he asked one of the secretaries if she would type something for him, as he has done before. When he showed her the petition she remarked, "Oh, yes". Mr. Ryan returned a few minutes later to pick up the petition, and he and the other employees initially involved signed it in the shipping office. Mr. Ryan then gathered an additional four signatures from employees at various points around the plant before the noon hour.

7. In response to questions Mr. Ryan had arranged for a meeting to be called of employees in the cafeteria during that lunch period. At that meeting Mr. Ryan had with him a petition prepared by someone else and calling for the creation of a labour-management committee. This petition was to be presented to the company. Mr. Ryan told employees they could sign that petition if they wanted to, but if they wanted to get anywhere they should sign the other petition. Mr. Ryan later threw away that second petition, and continued after the lunch hour to sign employees on the original petition. Mr. Ryan testified that he did not see any management personnel around at any time when he was circulating the petition in the plant, either the first morning or thereafter, but admits that he did not really pay attention to that because there was so little time to get the petition in before the terminal date. Mr. Ryan then left work at 2 p.m. on the terminal date, March 4, 1980, to deliver the petition to the Board. He obtained the permission of his lead hand, Mr. Schultz, who was one of the employees engaged in the origination of the petition. Mr. Ryan was in the front office with the petition just before leaving, when one of the office employees insisted on signing it, even though not part of the bargaining unit.

8. In assessing the voluntariness of this petition, the extent of the contact between the petitioners and the front office, and in particular Mr. Dorey, does raise in the Board's mind some question of the participation of management in its actual origination. To find that management was behind the petition, however, would require the Board to disbelieve the evidence of Mr. Ryan, and it is unnecessary for the Board to go this far. As the Board has stated, particularly in the *Morgan Adhesives* case, [1975] OLRB Rep. Nov. 813, while the *actual* involvement of management in a petition would be fatal to it, the mere *perception* of such involvement may be fatal as well, since the only issue before the Board on this inquiry is the voluntariness of the persons signing. In the present case, Mr. Ryan begins by complaining

loudly to Mr. Dorey about the union, in circumstances which would draw this occurrence to the attention of other employees, and Mr. Dorey and Mr. Ryan are then observed by the other employees proceeding together to Mr. Dorey's office. Thereafter Mr. Ryan and/or his fellow petitioners can be seen making several trips through the length of the plant to Mr. Dorey's office, and at the end of these visits a petition against the union emerges and is circulated through the plant by Mr. Ryan himself. The logical inferences of management involvement which employees would draw from this scenario are inescapable. In light of all the evidence, the Board is not satisfied that the petition submitted in this application represents a voluntary change of heart on the part of those employees who signed, and the Board finds that it can be given no weight.

9. There are, however, charges made by the respondent going to the reliability of the applicant's membership evidence itself which must be dealt with.

10. The evidence of Mr. Moses Concelos is that he was asked at the end of work on Friday, February 21st, by George West, an employee who had been organizing for the union, if the latter could come to his apartment that night. Mr. Concelos indicated that he was not interested in signing for the union but that, apart from that, George was welcome to drop up. George in fact visited Mr. Concelos' apartment that night about 7 o'clock, along with two other employees organizing for the union, Wayne Garrod and Tony Shivprasad. Also present at the apartment that night were Mario Machado, another employee of the respondent, and Mr. Concelos' wife, who was in bed in another room. Mr. Machado is the brother of Mr. Concelos' wife, and is now married to his sister. Both men had at the time been employed with the respondent only a few months, and obtained their jobs through Mr. Concelos' uncle, a supervisor there.

11. All witnesses agree that the meeting was cordial and lasted approximately half an hour. Mr. Concelos served wine, and topics other than just the union were discussed. When the union was discussed, however, Mr. Concelos again expressed his reluctance to sign a card, and his testimony of what then occurred is as follows:

"Wayne told me if I didn't sign it, someone in the plant might not like me, someone might throw bolts and nuts into my batches (that is, the material that I make) and Tony said if the Plant Manager finds that out he might not like you and fire you."

12. The applicant's witnesses deny that anything of this sort was said. They admit, however, to having consumed a substantial amount of alcohol that evening. Prior to attending at Mr. Concelos' apartment, the three union supporters stopped at a tavern and drank beer for about an hour-and-a-half, and then consumed an additional glass or two of wine at the apartment. Mr. Shivprasad indicated that by the time the group left the tavern, he was "in the mood" for more drinking. Mr. Concelos testified that he discussed the statement with Mr. Machado after the others left the apartment, and Mr. Machado indicated that "the way they said it, it sounded like they meant it".

13. It is agreed that Mr. Concelos by the end of the meeting still refused to sign, and indicated he was concerned the company might find out. Mr. Garrod then suggested that if Mr. Concelos had any questions, he could meet with Mr. Phillips, the union organizer, the next night. Mr. Concelos did that. The meeting took place at a tavern, and 9 or 10 employees were present. It appears the meeting lasted some one to two hours, and a wide range of topics

was discussed. The matter of the threat was never raised, and Mr. Concelos signed a union card. That card was, incidentally, one of those the Board refused to accept, as being defective on its face, in its decision of May 26, 1980, [1980] OLRB Rep. May 749.

14. In the Board's view, Mr. Concelos was the most credible of the four witnesses. Mr. Machado signed a card at the meeting in Concelos' apartment, but was less than candid about the point at which that occurred. As for the applicant's witnesses, Mr. Garrod was evasive about his reasons for attending at Mr. Concelos' apartment that evening, and his evidence became contradictory in this regard. He also testified that Mr. Concelos would have seen the three union supporters together in the car when he invited them to drop up, but the evidence of Mr. Shivprasad appears to contradict this. Mr. Shivprasad himself appeared to be less than candid with counsel for the respondent as to the extent of his own participation in the campaign, and gave evidence which contradicted that of both Mr. Concelos and Mr. Garrod. Given, as well, the evidence of drinking by the two witnesses of the applicant that evening, the recollection of Mr. Concelos as to what was said at the meeting appears in any event to be the most reliable.

15. In making its findings of credibility, the Board is mindful of the fact that Mr. Concelos had expressed great concern over the possibility that the company might find out if he were to sign a card. His uncle was, as noted, a supervisor in the company, and had been responsible for getting him the job. The Board concludes from the evidence that the company *did* find out, through Mr. Machado, that both he and Mr. Concelos had signed cards, and that the company at the same time heard from Mr. Machado the report of the intimidating statements. Mr. Concelos was then, in effect, confronted with this by the company.

16. Notwithstanding this, the Board accepts the evidence of Mr. Concelos that the statement was made. The Board further finds that the statement was an intimidatory one. The Board is not satisfied, on the other hand, that the statement caused Mr. Concelos to sign the card. That, however, is really an incidental issue. A statement of that type might well have greater coercive effect on an employee who did not have an uncle in management to go to if his work was being sabotaged, and is not the sort of statement which this Board countenances as an organizing practice. The question before the Board therefore is the effect to be given to this single reported incident of impropriety, in the light of the role which Mr. Garrod and Mr. Shivprasad played in the overall campaign.

17. Mr. Garrod testified that he, Shivprasad and West were the organizers in the campaign, and Mr. Garrod appears as the collector on every one of the cards collected. On the other hand, the comment was made in the context of an evening of drinking, and there is no other evidence of irregular organizing conduct before the Board. In considering whether the incident in question can be concluded to have been an isolated one, the Board recognizes that the alcohol factor may have contributed to the lack of judgment exhibited that evening. But even taking that into account, the Board cannot be satisfied the other cards were not procured in the campaign in a similar social context.

18. The Board has, on many occasions, expressed its concern over the integrity of membership evidence, given the hearsay nature of the evidence upon which the Board normally relies. See, most recently, *General Motors of Canada Limited*, [1980] OLRB Rep. Oct. 1437 and *Crock and Block Restaurant*, [1980] OLRB Rep. April 424. The question which the Board must determine whenever an irregularity becomes apparent is the extent to which

doubt is cast upon the remainder of the membership evidence. In *Reliance Electric*, [1979] OLRB Rep. Nov. 1107, which also dealt with an intimidating statement, the Board said:

... if there is evidence that an employee who approached employees with cards and acted as a collector utilized such a threat, it would be reasonable to discount all of the cards for which that individual acted as the collector.

While the Board may, in an appropriate case, go beyond this (e.g. *Crock and Block*, *supra*; *Walter E. Selck*, [1964] OLRB Rep. June 138), such a question does not arise here, as Mr. Garrod was the collector on all of the cards filed. Conduct as evidenced here on the part of the applicant's chief organizer has to be a matter of concern to the Board. In the circumstances, the Board is not satisfied that it has before it sufficient *voluntary* evidence of membership to grant outright certification to the applicant, and accedes to the request of the respondent that a representation vote be conducted amongst the employees of the bargaining unit as defined in paragraph 3.

19. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

20. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

21. The matter is referred to the Registrar.

DECISION OF BOARD MEMBERS, D. B. ARCHER:

1. The facts as set out in the Chairman's majority decision are not in dispute. It is agreed everyone who was claimed by the union as members had met the Board's standards for membership, i.e., signed a membership card, paid a dollar on their behalf and countersigned the receipt. Discounting the petition as the majority has done (and I agree with the decision that it should be disallowed), we come to the meeting between three union members and two prospective members at a Mr. Concelos' apartment.

2. There are contradictory statements, but we have the evidence of a family relationship between Mr. Concelos and his brother-in-law, Mr. Machado, both of whom received their jobs through the intervention of Mr. Concelos' uncle who is a supervisor at the plant. From their testimony, it is obvious that this relationship bothered and influenced them. At this point Mr. George West, an employee supporting the union, is told by Mr. Concelos that he can drop in at his apartment after work. Mr. West, along with two other employees, spent an hour-and-a-half at a local tavern then proceeded to Mr. Concelos' apartment and it is here that the alleged threat is made after Mr. Concelos had brought out a bottle of wine. It is difficult to sort out what was actually said. Mr. Concelos had some difficulty, not insurmountable, with the English language and Mr. West and his companions were in a jovial mood. I am quite convinced that whatever words were uttered they had no effect, certainly not on any other employee, and none in my opinion on the two prospective members. Even accepting the words at face value, it is difficult to know whether the threat was aimed at union or company. Only the company could fire and we are to believe that if somebody sabotaged

Mr. Concelos' batch Mr. Concelos would be fired and not the person causing the damage. The whole story in my opinion is too vague and farfetched to believe. A simpler explanation is that Mr. Concelos and Mr. Machado signed cards willingly — Mr. Machado before the so-called threat was uttered and Mr. Concelos some time later — then became frightened believing they somehow had let down their uncle, the supervisor, and, after a search by the company, were unearthed as two employees who had been coerced.

3. In view of all of the foregoing circumstances, I would give no weight to the allegation and would have certified the union.

0310-79-R; 0445-79-R Christian Labour Association of Canada, Applicant, v. **Richmond Insulation Company** — Division of Joy Wise Insulation Limited, Wise Insulation Limited, Respondents, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Intervener; International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. **Richmond Insulation Company**, and Wise Insulation Limited, Respondents

Practice and Procedure – Witness – Witness unable to continue cross-examination – Called to meet requirements of sections 55(13) and 1(5) – Board weighing prejudice to parties – Whether evidence given admissible – Whether hearings continued (Concurring decision of Board Member O. Hodges – Majority decision reported in [1980] OLRB Rep. Oct. 1519)

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: W. R. Herridge, Q.C., Y. Hamlin, J. Adema, R. Wright and Debra McAllister for Christian Labour Association of Canada; Ronald P. Leitch, Douglas B. Anderson and Joy Ann Wise for the respondent; B. Fishbein and J. Duffy for International Association of Heat and Frost Insulators and Asbestos Workers, Local 95.

CONCURRING DECISION OF BOARD MEMBER O. HODGES; December 10, 1980

I concur with my colleagues. The decision of October 16, 1980, in these matters is therefore unanimous.

2099-79-U; 2139-79-U; 2140-79-U; 2216-79-U; 2443-79-R; Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.), Applicant, v. Skyline Hotels Limited, Respondent.

Certification – Charges – Section 7a – Employer resorting to additional security and surveillance during organization campaign – Whether justified as *prima facie* incident of ownership – Lay-off or discharge of employees for union activity and other allegations – Counter allegations of harassment, intimidation and misrepresentation by union – Whether casting doubt upon membership evidence – Whether Board certifying without a vote

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *Alick Ryder, Q.C. for the applicant; G. Grossman for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; December 30, 1980

1. This matter involves the consolidation of a number of Board files arising out of efforts by the applicant, the Hotel and Club Employees' Union, Local 299, to organize employees of the respondent's Skyline Hotel located on Dixon Road in Toronto. The Board finds the applicant to be a "trade union" within the meaning of section 1(1)(n) of *The Labour Relations Act*. The respondent's "bar" employees already are represented by Local 280 of the same union, and still another Local represents the employees of the respondent at its Skyline Hotel in Ottawa. Local 299 itself already represents employees of the respondent at "The Old Mill in Toronto.

2. The present organizing campaign began in the last week of January 1980. As a result of certain incidents occurring in the first week of February, the applicant filed a section 79 complaint, containing a number of unfair labour practice charges, on February 11, 1980. Thereafter further section 79 complaints were filed, and these have all now been consolidated in the present proceedings. In essence, the complaints being pursued before the Board charge the respondent with excessive and improper use of security and surveillance arrangements, the fostering of an "in-house" employee committee, the issuance of an intimidating letter to switchboard operators, the removal of union cards from an employee's locker, and the lay-off or discharge, over a period of two weeks, of nine employees because of their union activity.

3. On February 28, 1980, the applicant filed its application for certification, in which it requested the taking of a pre-hearing vote. On March 13, 1980, the parties met with a Labour Relations Officer of the Board to determine the voting constituency and membership strength of the applicant, and the applicant discovered at that meeting that it lacked the thirty-five per cent membership support prerequisite to the Board's directing of a pre-hearing representation vote. The applicant then withdrew its original application (see decision of the Board dated March 31, 1980, Board File No. 2229-79-R) in favour of the present application for certification (Board File No. 2443-79-R). This application requested the issuance of a certificate pursuant to the Board's discretion under section 7a of *The Labour Relations Act*, relying upon the alleged violations of the Act contained in the aforesaid section 79 complaints.

The Board in a further decision dated June 5, 1980, ruled that it was not improper for the applicant to determine whether it had sufficient membership evidence for a pre-hearing vote, prior to relying on the inherently more protracted proceeding of an application under section 7a. With the agreement of the parties the new application for certification, being Board File No. 2443-79-R, was then consolidated with the section 79 complaints ongoing before this panel of the Board. The application essentially covers the full-time, non-bar employees of the respondent, being some 370 in number. There are approximately 250 part-time employees employed in the same categories.

4. Word of the applicant's organizing campaign first came to the respondent as a result of a complaint about the union made by an employee to her supervisor. This occurred on Friday, February 1st. The supervisor, Mrs. Bomba, then reported this to the Hotel's General Manager, Mr. Elsayed. Mr. Elsayed responded the same day by contacting the Hotel's regular security firm, Intertec, and arranging for the addition of three further security men for the next day, as well as the implementation of a signing-in procedure for all employees. The sign-in form itself requires an employee to indicate the time of his arrival, his scheduled starting time, and his department and supervisor. Mr. Elsayed testified that security at the Hotel had to that point been under-staffed and below the level needed to cover all exits and entrances for a normal hotel operation. He explained that it had not appeared necessary or he had not gotten around to doing anything about the situation until he heard the reports of union organizing taking place on the premises. He stated the purpose of the additional staff, apart from manning the sign-in procedure, was to patrol the Hotel "from top to bottom" to ensure that normal Hotel policies were observed and no one interfered with the staff while working, and also to prevent anyone who was not "authorized" from entering staff areas. It appears from the evidence that "staff areas" really meant any areas which were the property of the Hotel. Mr. Tom Lyall, who supervised the Hotel's security arrangements on behalf of Intertec, gave evidence before the Board and testified that his instructions were to lead management to any "abnormal employee movements" on the property owned by the respondent (including the portions exterior to the building). According to Mr. Lyall, the Security build-up began on the morning of Saturday, February 2nd, with an "emergency" request for three additional staff to handle the sign-in procedure. Mr. Lyall further testified that the build-up of security measures lasted until about the middle of March (which the Board notes was roughly the terminal date for the first application for certification) and that during that period Mr. Lyall moved into the Hotel at the request of the respondent.

5. Initially Mr. Elsayed testified that he took the action he did on February 1st in response to the report from Mrs. Bomba in the morning that one of her employees complained of being approached by the union. When examined on this by counsel for the applicant, however, Mr. Elsayed stated that Mrs. Bomba returned to him in the afternoon and reported that several more employees had been approached by the union that day. There are problems with either version in explaining Mr. Elsayed's actions. Firstly, the evidence of both the employee, Joyce Barclay, and Mrs. Bomba make it clear that Mrs. Barclay's only complaint on the 1st was that someone from the union had telephoned her at home, when no one was supposed to have her number. Secondly, Mrs. Bomba was again clear in her evidence in saying that she had no further conversations with Mr. Elsayed that day.

6. In any event, Mr. Elsayed's next step on that day was to call a special meeting of all of the department heads in the Hotel at 4:30. Mr. Elsayed testified that he asked whether anyone else had heard of any organizing on the premises, and he advised the supervisors

present that the employees could organize if they wanted to, so long as they did it properly. This apparently meant off the premises. The supervisors were instructed to keep a lookout for employees being approached on the premises. If an incident of this type were observed, they were to contact the Manager, or if it was another employee involved, to sent that employee back to his or her own work area.

7. That same afternoon an incident occurred involving a member of the Hotel's bell-stand, Mark Clarke, and the Hotel's Personnel Manager, Christine Smith. The applicant had held three meetings off the Skyline premises to discuss the possibility of organizing the Hotel, and these were attended by 5 or 6 employees interested in helping, including two members of the bell-stand, Mr. Clarke and Rick Walker. According to Clarke, Ms. Smith stopped him as he was reporting to work at 3:00 p.m. on February 1st and asked: "When's the union getting in?" She added that she knew it was Mr. Clarke who had started it. Mr. Clarke said he had not been scheduled to work the last two days, and had no idea what she was talking about. Ms. Smith then apologized for what she had said, and explained that she had to use a scare tactic to see if he was involved. She mentioned that she had gotten word from the front desk that the organizing had come from the bell-stand, and added, "It must have been Rick then". The conversation then turned to unions in general, and Ms. Smith commented that she did not mind herself if a union came in, but Mr. Hodgson (the owner) told her she would be Personnel Manager as long as the union did not get in.

8. That same day Mr. Clarke, as happens on occasion, was sent home early because of lack of business for the bell-staff. He returned after 1:00 a.m. with Mr. Walker and Mr. Hounslow (a staff organizer for the applicant) and began signing people up outside the Hotel. Because of the cold, the three eventually went inside the Hotel to the employee's time-clock area, and continued to sign people up there. After Hounslow and Walker had left, Mr. Clarke sat talking with another employee, Ian Jenkyn, for about an hour. The union cards were stacked beside him on the security desk. Around 3:30 a.m. security officer returned to the area, and discovered Mr. Clarke and Mr. Jenkyn. There is wide disparity in the evidence as to what ensued, but it is clear that the security officer ultimately said that he had better inform the Duty Manager about this, whereupon Mr. Clarke and Mr. Jenkyn departed in haste.

9. Around 8:30 a.m. Mr. Elsayed received a report that someone from the bell-stand had been at the security desk at 3:30 in the morning trying to organize on company premises, and Mr. Elsayed attended at the Hotel within the hour. From the description given by the security officer it was surmised that one of the individuals involved was Mark Clarke. Mr. Elsayed checked and found that Mr. Clarke was not yet punched or signed in for that day. About 10:15, however, it was reported to Mr. Elsayed that Mr. Clarke had been seen on the Hotel premises, in uniform. A search then began for Mr. Clarke involving Mr. Elsayed, his assistant Mr. Shukler, the front desk manager, the Duty Manager, and Mr. Lambrakos, the head of maintenance. Mr. Clarke, however, was not seen again that day.

10. Mr. Clarke's evidence was that because he had been sent home early on Friday, he decided to come in early on his own on Saturday, around 10:00 a.m., and work just for tips, in the hope that registrations would be heavy. Because he was not scheduled until noon, he did not punch in. He did notice a number of employees at the security desk, but walked past without being seen and without signing in. He testified that at the time he was unaware of a new sign-in procedure, and that he felt the employees gathered at the security desk may have been simply reading a newspaper. He described this practice of coming in early and working

only for tips as not uncommon amongst members of the bell-stand, although not one that had ever been approved by the Bell Captain, George Lucas. Mr. Clarke agreed that the Hotel was slow during the period, but said that sometimes a Saturday might be busy between 11 a.m. and 1 or 2 p.m. He maintained that he was unaware that anyone was looking for him. Rather, he testified that after being on for something less than 45 minutes, it was decided amongst the bell staff that business was slow and someone ought to go home. According to Mr. Clarke, Rick Walker, who was the Senior Bellman that day, suggested that since Clarke had not punched in, he might as well take the whole day off. The respondent's evidence on this point is that the Senior Bellman does not have the authority to send a man home early without checking with the Duty Manager. In any event, Mr. Clarke left the Hotel some time around 11:00 a.m.

11. When Mr. Elsayed was unable to locate Mr. Clarke that morning, he asked to see the time-sheet, and discovered that Mr. Clarke was not scheduled to start until noon. He then phoned George Lucas, the Bell Captain, at home and told him that one of his men, Clarke, had been seen at 3:30 that morning trying to organize on company premises. He directed Mr. Lucas to get hold of Mr. Clarke and suspend him pending investigation. Mr. Elsayed then decided on Sunday to discharge Mr. Clarke (without speaking to him) and Mr. Lucas was told to notify Clarke of that fact. The reason given by Mr. Elsayed for not waiting to hear Mr. Clarke's explanation is that Clarke failed to show for his Sunday shift as well. Mr. Clarke denies this, and the Board notes that no reference was ever made in the respondent's reasons for discharge to missing more than one shift. The grounds which Mr. Elsayed gave to the Board for the discharge of Clarke (apart from one dealt with below) are as follows:

- (1) being on company premises when he was not supposed to be in;
- (2) being on duty the next morning in uniform without using the proper entrance;
- (3) failing to show up for his 12 o'clock shift;
- (4) organizing on company premises.

Mr. Elsayed testified that it is a rule of the Hotel that employees must be off the premises within half an hour of completion of their shift. Ian Jenkyn, the other employee with Clarke at 3:30 Saturday morning, received a three-day suspension for the incident. Mr. Jenkyn is employed in one of the Hotel's bar-rooms, and accordingly is covered by the collective agreement with the applicant's sister local. The outstanding feature of Clarke's case, according to Mr. Elsayed, was the fact that he had alcohol on the premises. However, the evidence indicated there were two cans of "pop" that night, so that the distinction between Clarke and Jenkyn on this ground is difficult to sustain. More importantly, the applicant complained that this was not a ground raised by the respondent at any time prior to the hearing, and objected to its admission. The majority of the Board upheld the applicant's objection on the basis that the ground sought to be relied upon was not one of the previously-stated reasons for discharge, and noted as a practical matter that the respondent could scarcely hope to satisfy the reverse onus under section 79(4a) with a ground now said to be critical but which was overlooked by the respondent in filing its own reply.

12. The Board notes that evidence in connection with Clarke's discharge was also given by Mr. Lucas, the Bell Captain, and his evidence conflicted in a number of respects with that of

Mr. Elsayed. Mr. Lucas, however, had at the time of testifying just returned from extensive hospitalization, and his recollection of the events in question appeared to be hazy at best. Because of Mr. Lucas' difficulty in recalling material points in the events of that period, the Board finds that it can place little reliance on his evidence, and the respondent must be judged on the basis of Mr. Elsayed's testimony. The Board notes that it was Mr. Elsayed's evidence in any event that the decision to discharge Mr. Clarke was his, and Lucas simply acted on his instructions.

13. The respondent was permitted to place before the Board a further incident with Mr. Clarke occurring on the evening of Monday, February, as evidence of the kind of conduct the respondent was encountering. The evidence is not disputed that Mr. Clarke and one or two other organizers were in "Diamond Lil's", one of the Hotel's bars, and that Mr. Clarke twice refused to leave when requested to do so by management. Mr. Clarke told first the Duty Manager and then the Assistant General Manager that they did not have the right to order him off the premises. The police were summoned by the respondent, and Mr. Clarke, after conferring with the police officer, left.

14. The earlier incident involving Mr. Clarke (at 3:30 Saturday morning) led to a discussion between Tom Lyall, the supervisor from Intertec, and Santos Perri, the security officer on duty that night. In the discussion Mr. Perri made it apparent that he was sympathetic to the union and was therefore having difficulty carrying out the instructions from the Hotel. Mr. Perri in fact indicated at that time (although he retracted it later) that he had even signed some employees on behalf of the union. It was agreed between the two men that it would be appropriate for Mr. Perri to resign, and he did so. A couple of days later Mr. Perri returned to the Hotel to clear out his locker, and was chatting with an employee in one of the shops. According to Mr. Perri, the owner, Mr. Hodgson, entered with several others and began swearing at him. He was told not to come back to the Hotel, and thereupon was escorted out. Mr. Perri testified that after that incident he became an active organizer of the Hotel's employees on behalf of the union. He added that on one occasion while doing so outside the Hotel, Mr. Shukler came running over and asked the lady Mr. Perri was talking to: "Is this man bothering you?" After that, the lady refused to talk to Mr. Perri.

15. The next significant event was the layoff (and ultimate discharge) of Frank Ragni. Mr. Ragni worked in the Hotel's restaurant known as Alfredo's, and the evidence establishes that he was employed essentially as a busboy. Mr. Ragni's evidence is that he was enlisted as an organizer by Ian Jenkyn on January 30th, the Wednesday before his layoff. He signed up a number of employees while at work on both the Wednesday and the Friday of that week. On Friday the restaurant's Maitre'd, Mr. Scovenna, approached Mr. Ragni and told him he had "a big mouth" and should not have "gotten involved". Mr. Ragni asked Scovenna's opinion of the organizing and was told it was all right, as long as he did not get caught. Mr. Scovenna in his evidence went so far as to agree that he had a discussion with Ragni a day or two before the layoff on the value of a union, and testified that he "may" have told him he had a big mouth. Mr. Scovenna's main evidence was that it was decided about 10 days previously that there had to be a layoff, based on the level of business which the Hotel's figures forecast. Mr. Ragni was the choice for Alfredo's because the remaining employees were waiters and could do the work of both a waiter and a busboy. Upon further examination, however, it was revealed that no firm decision to lay off had been made at that time, and that in fact Mr. Scovenna was optimistic that no layoff would be necessary. No new element was raised to explain the decision attributed to Mr. Elsayed to lay Mr. Ragni off on Saturday, February 2nd, and Mr.

Elsayed did not give evidence on Mr. Ragni's complaint. When Mr. Ragni reported for his shift at 3 p.m. that Saturday, he was not allowed to start work. Rather, he was advised by Mr. Shukler that he had to be laid off, and was escorted out of the Hotel by security. The Board heard evidence from the respondent that it was normal to ban employees from the Hotel premises for a period of time following a discharge, but it is not clear whether the same policy is alleged to have applied to persons merely laid off. There was, in any event, no cogent evidence of the extent to which this policy was being enforced prior to the applicant's campaign.

16. The remainder of the respondent's evidence on Mr. Ragni pertained to the subsequent events of that evening. Mr. Shukler testified that he observed Mr. Ragni around the time-clock area around 7 p.m., but when he called to him, Mr. Ragni ran off. He saw Mr. Ragni again at 9 p.m., and made it clear that he was not wanted on the premises. About 11 p.m. Mr. Shukler heard from security that Mr. Ragni was again outside the south lobby, and Mr. Shukler proceeded to that entrance. Mr. Ragni explained that he was there to meet his sister. Mr. Shukler offered to escort him in to do so, but Mr. Ragni then said he had to wait for someone named "Bill". Mr. Shukler indicated to Mr. Ragni that if he persisted in coming back to the Hotel, he would have no alternative but to terminate him. According to Mr. Shukler, Mr. Ragni stated that he didn't care one way or the other, and that Shukler knew what it was about. Mr. Shukler then threatened to call the police, and Mr. Ragni left. Mr. Shukler then reported the incident to Mr. Elsayed, who apparently made the ultimate decision to fire Mr. Ragni. Mr. Ragni in his evidence agreed that he was in the area of the Hotel that evening, but he testified that he was simply waiting in his car for his sister, and that he left when he was told to do so. He testified that he met Mr. Shukler some weeks later and Mr. Shukler told him that he would get his job back "when all this cooled down". Mr. Shukler denies saying anything of that nature.

17. A complaint was also filed by the applicant in connection with Mr. Ragni's locker. Mr. Shukler testified that when he observed Mr. Ragni return to the time-clock area after his layoff on Saturday evening, he became concerned about the two Hotel tuxedos which Mr. Ragni kept in his locker. Mr. Shukler therefore went to the locker room with Tom Lyall and opened Mr. Ragni's locker. He took note of everything which the locker contained, including a pile of union cards. Mr. Lyall testified that Mr. Shukler picked up a couple of the cards, glanced at them briefly, and put them back. Mr. Shukler testified that he re-locked the locker and then put a second lock on it. He returned later with a maintenance crew and placed the locker in the food-and-beverage storeroom, which is also locked. Mr. Ragni testified that amongst the cards in his locker were two that had been signed. When he went to clear out his locker a week after his layoff, Mr. Ragni claims the two signed cards were missing.

18. Rick Walker, the second member of the Bell-stand allegedly referred to by Christine Smith, was discharged on either February 4th or 5th. The evidence established that there was considerable dissatisfaction with Mr. Walker's work performance during the early part of 1979. Mr. Lucas, the Bell Captain, could not, however, recall any specific incident of speaking to Mr. Walker since August of 1979. On either February 4th or 5th, Mr. Lucas called Mr. Walker into his office and stated that as a result of a complaint from a guest on the weekend, he was discharging him. Mr. Walker testified that he asked Mr. Lucas to tell him the nature of the complaint, but Mr. Lucas refused. Mr. Lucas, in his testimony, could not recall what he said to Mr. Walker, or what he said to Mr. Elsayed about this incident, or why he might have waited a

day before acting on the complaint, or when it was that he first learned of the organizing activity at the Hotel.

19. Greg Kewley, another member of the bell-stand, was also notified by Mr. Lucas that he was being let go. Mr. Kewley testified that he was the one originally responsible for signing into the union the other members of the bell-stand. He had been employed since August of 1979 without a complaint. On February 5th, he was called into the office of Mr. Lucas and discharged. Mr. Lucas told him the decision came from higher up, as a result of complaints from customers. Mr. Kewley chose to call no evidence on his complaint.

20. The fourth member of the bell-stand terminated was Randy Nichols. Mr. Lucas testified that Nichols was approaching the end of his 3-month probationary period, and simply did not seem capable of picking up the work of a good bellman. Mr. Lucas further testified that he spoke to Nichols on a number of occasions and finally decided to terminate him on February 7th. In his own evidence, Mr. Nichols confirmed that he had in fact been employed for just under three months, but denied that he had ever been singled out by Lucas for criticism. Mr. Nichols testified that he signed a union card at work in the week of January 28th, and on several occasions thereafter spent some time outside the Hotel talking to the union recruiters. He added that on Wednesday, February 6th, Mr. Shukler and other management personnel came outside 2 or 3 times and were writing things down. The next day when he reported for work Mr. Lucas advised him that the Hotel had had a couple of complaints from guests and that he was being let go. Mr. Nichols' replacement was already on the job, and his separation papers were ready for him.

21. In addition to the extra security measures already undertaken within the Hotel, the respondent, on or about February 5th, instituted outside security patrols as well, beginning with one car normally stationed on the receiving ramp, which immediately overlooks the Hotel's employee-entrance. The evidence of Mr. Elsayed was that the purpose of the outside security was to ensure that no employees were being harassed by campaigners, and to provide an escort service to any employees who wished it. He added that management had received a number of requests for help from employees who were refusing to come to work. The Board did hear evidence more or less to that effect from several employees at the hearing, and their written complaints to management were filed as well. The written complaints, however, are mostly undated, and the oral evidence suggests that all of them were made at a point much later in February. There is no evidence that any employee ever used the outside security staff as an escort during the campaign, or recognized that as its purpose, and it is admitted that the respondent took no steps to communicate that purpose to employees generally.

22. Mr. Lyall, Intertec's supervisor, testified that the purpose of the cars was foremost to ensure that the people in the campaign which the Hotel had suspended did not come on the premises. This was confirmed by the testimony of the other Intertec personnel who were carrying out the exterior patrols. Indeed, the evidence of one of them, Bernard Wilson, was that he was having so much difficulty keeping the banned individuals from entering the Hotel that he recommended the addition of a second car. The evidence discloses that Messrs. Ragni and Walker, in particular, made repeated efforts to enter the premises when requested not to do so. When the security man would leave his post in pursuit of one of the banned individuals, or to report his entry to management, another of the group would be discovered to have entered the Hotel. Mr. Ragni would also drive his Corvette through the Skyline parking lot from time to time, apparently taunting the security staff. Following several of the above incidents, a second car was instituted on February 7th.

23. One of the cars regularly used for this purpose, and parked on the loading ramp, was a readily identifiable white "Intertec" car with an orange bubble on its roof. If a union organizer would step onto Skyline property to approach an employee, the security man would honk, and the organizer would step back. The evidence of the security personnel makes it clear that the ban on entry of the premises extended both to the terminated employees of the respondent, such as Messrs. Clarke, Ragni, and Walker, and to staff organizers such as Mr. Hounslow.

24. Early in the week of February 4th, two members of the Hotel's switchboard staff were terminated as well. One of them, Linda Hartery, testified that she had been employed 3 years without any complaints from management. On Monday, February 4th, Ms. Hartery came to work about an hour-and-a-half early and joined in the recruiting activity taking place just off the Hotel's back parking-lot. She testified that a number of members of management, including Mr. Shukler, at one point came out on the loading platform for several minutes and observed the actions of herself and the other recruiters. Her evidence is that shortly after she reported for work on the switchboard, Mr. Shukler entered the switchboard room and angrily asked her if she had just been organizing for the union. She answered that she had. Mr. Shukler asked her if she had asked her lawyer about the propriety of recruiting and then reporting to work. He left, but a few minutes later returned and summoned her outside. In the hall they met Christine Smith, the Personnel Manager, and Mr. Shukler told Miss Smith to put down that Miss Hartery was being terminated for listening in on Mr. McGrath's calls. Mr. McGrath was the Duty Manager at the time. Miss Hartery denies handling any call from Mr. McGrath during her shift that day. The evidence of Miss Martino, another switchboard operator on duty at this time, was clearly confused as to the sequence of events that day, but her evidence did substantiate the initial exchange between Shukler and Hartery, and she described Mr. Shukler as "storming". In addition, Miss Martino testified that she spoke to her supervisor Eileen Sleightholm about the discharge afterwards, and that Mrs. Sleightholm commented that Miss Hartery was not fired "for the right reason".

25. The respondent's evidence with respect to this discharge came from Mr. Shukler and Mr. McGrath. It will be recalled that one of Intertec's security personnel, Mr. Perri, had resigned and commenced to organize at the Hotel on behalf of the applicant. Mr. Shukler testified that he began to have doubts about Mr. Perri because of the number of times he had to be chased off the premises, and so he requested Mr. McGrath to find out from the police whether Mr. Perri had a criminal record. His explanation for this was that if Mr. Perri did, that would give him more leeway in getting the police to act. Mr. Shukler testified that he was present in Mr. McGrath's office when Mr. McGrath made the telephone calls to the police. According to Mr. Shukler, Mr. McGrath picked up the telephone and said, "Linda, put me through to Division 23". Mr. McGrath then slammed the phone down, saying he had been cut off. He again picked up the receiver and said: "Linda, you cut me off". After a pause, McGrath began a conversation with someone, but interrupted it to indicate to Shukler that he thought someone was listening in. Mr. Shukler told him to hang up. Seconds later Detective Lupinski of 23 Division rang back, and McGrath advised Shukler that Lupinski also thought someone was listening in. Shukler advised McGrath to hang up and call again so that he (Shukler) could check it out. Shukler then went to the switchboard room. He said that through the doorway he could observe the first operator with her hand over the mouthpiece, and heard her say: "Oh my God, he's calling Division 23 again". Shukler testified that he then entered the room and asked, "Who is Linda here"? When the first operator identified herself, Shukler said: "I remember you" and indicated he had seen her with the recruiters earlier that day. He then stated that she had been

listening in on telephone calls and asked her to leave the room with him. Shukler testified that another operator said: "You don't have to say anything, you don't have to give them any information". Miss Hartery stated that she was going to get in touch with the union.

26. Mr. McGrath, as indicated, was the Deputy Manager at the time, and gave evidence in a somewhat discomforted state after working the night-shift. He confirmed that Mr. Shukler had asked him to telephone the police about Perri, and that he encountered difficulties in doing so, both in being cut off, and in hearing female voices on the line. Contrary to Mr. Shukler's evidence, however, he testified that when he asked for the call to be placed the second time, after being cut off, he heard someone on the line say: "Oh my God, he's calling the police again". He testified that Mr. Shukler entered his office at about that time, and he indicated to Shukler that someone was listening in. Shukler told him to hang up and call back, and at that point Shukler left his office. Mr. McGrath did confirm telling Shukler that Detective Lupinski as well had commented upon the problems with the line. Mr. McGrath had no more involvement in the matter.

27. The Linda Hartery incident was followed by a February 6th memorandum from the Hotel's owner, Mr. Hodgson, to Mr. Elsayed expressing deep concern over the possibility of switchboard operators listening in on telephone calls. The memorandum suggests that a copy be shown to each operator, and includes the following paragraph:

I would ask you to meet with Mrs. E. Sleightholm, your switchboard supervisor, and her staff if possible and to again fully impress upon them the seriousness of this matter and the consequences should it ever happen.

The applicant complains about this as a further attempt to convey to employees that what happened to Linda Hartery as a result of her union activities could happen to them.

28. Prior to this memorandum, a second switchboard operator, Debbie Chevalier, was terminated. Miss Chevalier had been employed about 2 years, and had received no negative comments about her work. She testified that she arrived at work about an hour early on Sunday, February 3rd. The security guard made a fuss about her arriving that early, so she told him she had just come from bowling. On Monday, her supervisor, Eileen Sleightholm, came to her upset and trembling and said to her: "I can't tell you what was said, but watch yourself—they think you came in early yesterday to get signatures". On Tuesday Miss Chevalier was again approached by Mrs. Sleightholm, who said: "They still think it's you". Shortly thereafter, Mrs. Sleightholm was summoned to Mr. Shukler's office. When she returned, she was crying and called Miss Chevalier out of the switchboard room. She told Miss Chevalier: "I hate to do it; It's not my idea, but he told me I have to let you go immediately". Miss Chevalier then went to see Mr. Shukler, who said that there were complaints about her work. According to Miss Chevalier, Mr. Shukler refused to specify the complaints, and denied that it had anything to do with the union. He then added that it was not his idea anyway, rather that Eileen [Sleightholm] was not satisfied with her work. Mr. Shukler expressed his surprise when Miss Chevalier related to him what Mrs. Sleightholm had just said. Miss Chevalier further testified that she saw Mrs. Sleightholm several days after the discharge and began chatting informally with her. Mrs. Sleightholm indicated that it was "weird" working at the Hotel with all the security there then, and added: "You know you were fired because of the union".

29. Mr. Shukler did not testify about the discharge of Miss Chevalier, but rather Mr. Elsayed did, indicating to the Board that the decision to discharge her was his. He testified that a few months prior, the Chairman of the Board had complained to him about Miss Chevalier wandering around the Hotel, and not being at the switchboard when he needed her. Mr. Elsayed stated that her discharge was triggered by reports from security that she was seen at the Hotel after her shift on Friday, which "of course was against company policy". Miss Chevalier at the hearing denied returning to the Hotel after her shift, but subsequently advised the Board by letter that she recalled doing so, and offered to re-attend as a witness.

30. At the end of this same week, a maintenance cleaner, Adriana Colagiacomo was laid off by the respondent. She had been employed for just over a year and was the most junior of the cleaners. Miss Colagiacomo, it would appear, was not above writing love letters on the surface of Hotel desk drawers, nor "disappearing" into the washrooms for extended breaks. While this may evidence that Miss Colagiacomo was a less than model employee, the respondent did not appear to rely on such matters at the time she was let go. Rather, Mr. Lambrakos, the maintenance manager, testified that Miss Colagiacomo was laid off because business was slow and she was the employee with the least seniority. The evidence of Miss Colagiacomo is that the same morning that she was laid off, she had arrived at work by bus and was stopped by a union organizer at the bus-stop. She says she signed a union card at that point. She did not see anyone around from management, but testified that the bus-stop is located in front of the Hotel. She was advised of her layoff later that morning. Miss Colagiacomo had been "resting" in the washroom for over an hour that morning before Mr. Lambrakos was able to locate her. Miss Colagiacomo says that after she returned with Mr. Lambrakos to his office he asked her if she had signed a union card. She admitted that she had. In the same conversation she was advised of her layoff. Shortly after that discussion Mr. Lambrakos called her back to his office to tell her that her layoff had nothing to do with the union. Mr. Lambrakos' evidence is that it was Miss Colagiacomo who mentioned the union, and that he had no knowledge of her signing a card. He testified that when he advised her that a layoff was coming up and that she had to be laid off as the most junior person, she started to cry and said it was because she had signed with the union. Miss Colagiacomo had at the close of the hearings not yet been recalled.

31. The final discharge covered by these complaints occurred approximately a week later. The employee terminated was Litza Damianidis, a waitress in the coffee shop. She had been employed a short time only, and had in fact been terminated by Mr. Elsayed for her poor service once before. Her supervisor, Mrs. Tomlinson, on that occasion had persuaded Mr. Elsayed to give Mrs. Damianidis another chance. Mrs. Damianidis continued to have problems however, and Mrs. Tomlinson finally decided to fire her when she disobeyed the clear instructions of Mrs. Tomlinson and pocketed a "tip" which Mrs. Tomlinson had told her was meant to be applied to a customer's bill. Mrs. Damianidis appealed her discharge to the Personnel Manager, Christine Smith, who discussed it with Mrs. Tomlinson, but it was decided that the discharge must stand. Mrs. Damianidis did not appear at the hearing to testify on her own behalf, and there was no evidence of any union activity on her part.

32. In addition to the matters already reviewed, the applicant complains that the respondent was instrumental in the formation of a "Hotel Committee" for employees as a means of diverting support away from the union. The purpose of the Committee was to represent the employees in dealing with Hotel management. Considerable evidence was called to show that the principal figure, Mr. Morelli, an employee in the room-service department,

was allowed to circulate freely to solicit signatures on the “petition” supporting the Hotel Committee, and that a meeting of some 100 employees was held by Mr. Morelli in one of the Hotel’s ballrooms. The evidence does establish that at least one supervisor, Gina, (and possibly two others) was involved to an extent in promoting the petition, and that Mr. Lucas, the Bell Captain, urged members of his staff to attend the meeting. Mr. Elsayed testified that he made it clear to Mr. Morelli that no meeting could take place on Hotel premises and that he had no knowledge prior to the hearing that the meeting took place in the Hotel’s ballroom. Mr. Lyall, of Intertec, and Mr. Shukler both testified, however, that they learned of the meeting shortly after it took place. Mr. Elsayed appears to have shown more than a passing interest in employee activity during this period, and the Board has difficulty accepting that he would not have been informed of the meeting by one of these other two gentlemen. In addition, Mr. Morelli himself was not called to give evidence. The Board has grave suspicions, therefore, over Mr. Elsayed’s denials.

33. What conclusion is the Board to draw from the evidence pertaining to the various incidents of discharge and layoff, particularly in light of the respondent’s conduct in general? The lawfulness of the respondent’s security response will be discussed below. The very immediacy and extent of this response, however, is indicative of the respondent’s pre-occupation with the applicant’s organizing efforts during this period, and cannot be divorced from the comment attributed to the owner of the Hotel, Mr. Hodgson, that Miss Smith would be Personnel Manager “as long as the union didn’t get in”. Miss Smith was a totally credible witness, and the Board notes that she was not asked to deny her statement when she herself testified later in the proceedings. In addition, there are the statements attributed to the switchboard supervisor, Eileen Sleightholm, indicating that Miss Chevalier was fired for her union activity, and that Linda Hartery was not fired “for the right reason”. The Board waited throughout the proceedings for a denial to come forth from Mrs. Sleightholm, but Mrs. Sleightholm never was called as a witness.

34. Given the uncontradicted evidence pertaining to Mrs. Sleightholm, together with the patent flimsiness of the respondent’s case against Miss Chevalier, the Board has no doubt that Miss Chevalier was fired for union activity, in violation of section 58 of the Act. Indeed, the Board cannot say enough about the effect the decision to contest a case like Miss Chevalier’s, particularly through the respondent’s chief witness, Mr. Elsayed, had upon the respondent’s credibility in the remainder of the proceedings.

35. In the case of Linda Hartery, even accepting that Mr. McGrath was confused in his evidence and that Mr. Shukler did observe Miss Hartery with her hand over her mouthpiece saying “Oh my God, he’s calling Division 23 again”, the decision to terminate her immediately, without discussion, cannot be readily explained, when Mr. Shukler knew that the operator was being *asked* to place the call. Rather, Mr. Shukler’s spontaneous reaction appears to be a carry-over from his earlier pique when he discovered Miss Hartery engaging in recruiting activity to reporting for work. In the circumstances, the Board is satisfied that Miss Hartery’s union activities were at least a factor in her summary discharge. That, as the Board has said on numerous occasions, is sufficient to establish a violation of section 58. See, for example, *R. v. Bushnell Communications* (1974), 47 D.L.R. (3d) 688 (Ont. C.A.). The Board does not, however, on the evidence find the memorandum of February 6th from Mr. Hodgson, expressing his concern over the possibility of wire-tapping, to be a violation of the Act.

36. The comments attributed to Miss Smith, and not denied, also colour the discharges

of the four members of the bell-stand, which Miss Smith identified as the source of the organizing. It is to be noted that the discharges of Walker, Kewley and Nichols all were allegedly triggered by complaints from customers, about which no details were given. This is a patently convenient ground for the respondent to adopt, since it can claim that to disclose any details of the complaint would have identified the customer to the grievors, and such claim cannot be said to be unreasonable. A natural suspicion arises, however, as one proceeds from one discharge to another in this case, not unlike the situation before the Board in *ABC Day Nursery and Kindergarten Limited*, [1980] OLRB Rep. April 391. In the circumstances of this case, the Board finds it was incumbent upon the respondent to satisfy the Board by affirmative evidence that the customer complaints did take place and (as always) that the complaints were the only factor in the grievors' discharge. This the respondent has failed to do. On the evidence the Board finds that Messrs. Walker, Kewley and Nichols were discharged for their union activity, in violation of section 58 of the Act.

37. The case of Mr. Clarke is more difficult. The Board has considerable doubt over the candour of Mr. Clarke in telling the Board that his appearance at work on the Saturday morning, virtually without sleep, was unrelated to his union activities, particularly when he chose to vacate the premises immediately prior to the time when business might be expected to pick up. The involvement of Mr. Walker, his fellow organizer, in the decision to leave the premises and not report for his scheduled shift scarcely lends authenticity to Mr. Clarke's testimony. It is to be noted that the protections under section 58 of *The Labour Relations Act* extend only to the lawful activities of a trade union and its supporters. See, for example, *Durham College of Applied Arts and Technology*, [1979] OLRB Rep. Nov. 1077. Mr. Clarke's presence on the premises at an unauthorized time, in the early hours of Saturday morning, for example, could in some circumstances be characterized as unlawful. The rule banning such presence after the completion of an employee's shift appears, however, to have been rarely enforced, if at all, prior to this time, and certainly not with the dedication and vigour exhibited after the applicant's campaign began. Having regard to the minimal impact which Mr. Clarke's conduct had on the respondent's operations and the fact that the decision to discharge was made before any discussion with Mr. Clarke, as well as the overall circumstances of this case, the Board is not satisfied that the penalty imposed on Mr. Clarke would have been discharge, had his "improper" activities not been connected with the union. The Board therefore finds that Mr. Clarke was discharged in violation of section 58 of the Act.

38. The discharge of Mr. Ragni must be viewed in the light of his layoff earlier in the evening. The evidence discloses that no clear decision had been made to lay off Mr. Ragni prior to Saturday, February 2nd, and that the respondent became aware of Mr. Ragni's organizing activities at least the day before. Mr. Ragni is then headed off when he reports for work on Saturday, before he can commence his scheduled shift, and escorted off the premises. In addition, the decision both to lay off and to terminate Mr. Ragni on this complaint. Given the surrounding circumstances, and the reverse onus created by section 79(4a), the failure to testify on the part of the individual who actually made the decision is in itself fatal. The Board finds that Mr. Ragni was both laid off and then terminated because of his union activity, in violation of section 58 of the Act.

39. With respect to the signed cards allegedly missing from Mr. Ragni's locker, the Board would have to be satisfied that the respondent did take the cards, before ordering it to return them, and the Board finds this allegation not to have been established. The treatment of the locker by Mr. Shukler in double-locking it and then moving it to the locked storage area is

indicative of the paranoia of the respondent surrounding the applicant's organizing campaign, but the Board finds it unlikely that Mr. Shukler would have removed the two signed cards after so clearly tampering with the locker. On the balance of probabilities, therefore, the Board concludes that it is more likely that Mr. Ragni misplaced the cards in some other fashion, and that the cards were not left in the locker as Mr. Ragni believed. This aspect of the complaint therefore is dismissed.

40. The case of Adriana Colagiacomo is a difficult one. Miss Colagiacomo, unlike the other grievors, engaged in no overt union activity, and it is possible that her layoff on the last day of the week only coincidentally occurred on the day she signed a union card. In that event it is readily understandable that Miss Colagiacomo would *think* she was being laid off because she had signed, and blurt that out in the manner described by Mr. Lambrakos. On the other hand, it is the evidence of Miss Colagiacomo that it was *Mr. Lambrakos* who first raised the question of the union card, thus indicating that her activities at the bus-stop had been observed and that the timing of her layoff was more than mere coincidence. The Board has difficulty in choosing the evidence of one over the other. However, given the pattern of conduct otherwise established in these proceedings, together with the reverse onus provided by section 79(4a), the Board finds that the uncertainty must be resolved against the respondent. The Board therefore concludes that the layoff of Miss Colagiacomo, occurring when it did, was at least in part a reaction to her lawful union activity, and in violation of section 58 of the Act.

41. The final complaint is that of Litza Damianidis, the waitress discharged by Mrs. Tomlinson. The Board found no reason to doubt the testimony of either Mrs. Tomlinson or Miss Smith in this regard. The grievor appears to have played no part in the applicant's organizing campaign, and did not appear at the hearing in support of her complain. The Board finds on the evidence that the complaint of Mrs. Damianidis must be dismissed.

42. There are in addition charges filed by the respondent alleging that the applicant obtained membership evidence by harassment, intimidation, and misrepresentation. The last ground included both misrepresentation as to the nature of what was being signed, and as to the employment status of organizers such as Mr. Ragni and the former security officer, Mr. Perri.

43. Six employees gave evidence with respect to being constantly approached by union organizers when coming to or going from work. Each of the six had filed a note with management setting out their complaint. While a number of the employees indicated they had someone else (not in management) actually transcribe their words onto paper, they all insisted that the idea of writing a note was entirely their own, and that the words appearing in the note were also their own. Each denied as well having ever discussed the note with any other employee. This was the first time any of them had ever communicated their views to management in writing. Given the difficulty in writing that most of them attested to, this is not surprising. The English translation, provided by the respondent, of each of the notes is as follows:

“To Hotel Management:

I'm sick and tire to be approached mornings and nights by Union people.
I don't want the union. You have to do something. Thank you.

TO THE HOTEL MANAGEMENT

I'm tired to be harassed after a working day from people wanting Union.
I don't want the union.

TO HOTEL MANAGEMENT

The undersigned Cecilia Angelucci would like to let you know that I'm sick and tired from what his happening here. Every day when I leave work I meet these people who keeps harassing me, even in the morning when I come to work. I want to be left alone in peace, I don't want to be disturbed. Try to do something.

To Hotel Management:

It's a real problem, every morning when I come to work I'm approached by Union people. I don't want the Union. You have to do something. Thank you.

TO SKYLINE MANAGEMENT

Every morning and night coming and leaving work I'm harassed by Union people. I don't want the Union. Thank you.

I have repeatedly been harrassed [sic] by the union members both coming & going from work on several occasions. They have repeatedly phone my home as well. This has involved both myself and my children. I do not like the idea of them having my private phone number."

The Board has no reason to disbelieve that these employees were being repeatedly approached by the organizers. Indeed, by the end of his testimony, Mr. Ragni admitted as much. Mr. Ragni explained his own persistence on the basis that he often found that even though an employee would tell him not to talk to him, if he kept after the employee (including getting on the same bus) and eventually was able to speak to that employee with no one else around, the employee would show more interest. He found, on the buses, for example, that he might approach an employee when he thought they were alone, but the employee would say: "Not now, there's another employee two rows up".

45. In terms of what is credible in this case, no single aspect can be viewed entirely in isolation from the full circumstances set out earlier by the Board. Given the kind of security response initiated by the respondent, together with the number of union-related firings taking place in one week, a sense of anxiety and mistrust amongst the employees is not hard to believe, nor is the reluctance of many to openly and freely participate in discussions with a union organizer. The need for persistence on the part of the union organizers was therefore, in large measure, a reflection of the atmosphere which the respondent deliberately sought to create. Had that persistence reached unlawful proportions, such as, for example, actual physical interference, there are matters which can be, and could have been, reported to the police. The Board does not find on the evidence that the conduct of the union organizers here reached such proportions. Each of the employees who testified agreed that the persistence of the organizers was not such as to cause them to do anything they did not want to do. Indeed, while the Board is prepared to believe that complaints were made, given the curious similarity

in the notes, the Board is skeptical that the conduct was even such as to cause the employees, without management involvement, to go as far as writing their own notes.

46. The misrepresentation evidence came primarily from Mrs. Pavlovska and Mrs. Castaneda. Mrs. Pavlovska testified that she signed the union card because she thought she was buying a lottery ticket. She testified that Mr. Ragni said: "Sign down here and you'll get more money". Initially she stated flatly that Mr. Ragni never used the words lottery ticket. When asked on cross-examination how she had come to the conclusion she did, she became markedly evasive, and testified that Mr. Ragni said it was a lottery ticket.

47. Mrs. Castaneda said that she saw Mr. Ragni and others collecting signatures outside the Hotel when Mr. Perri (whom she did not know was no longer employed as a security officer), came over and said: "You know me. We need the signatures to protect the night girls". So she signed. She then testified that she became confused and spoke to her supervisor, who gave her time off to speak to the manager. It was the manager who told her for the first time that what she signed was a union card. This took place on Monday, February 4th. Mrs. Castaneda worked both the Saturday and Sunday before (when both the applicant's campaign and the respondent's reactions "broke") but testified that the first she knew of the union was from the manager. When asked on cross-examination, she could not explain in any way that was consistent why it was she decided to take her problem to management before finding out it was the union that was involved.

48. The Board is not satisfied on their evidence that either Mrs. Pavlovska or Mrs. Castaneda were misled as to what they were signing. Given the respondent's own conduct and the series of firings, the Board finds it more likely that these employees knew what they were signing, but afterwards began to fear for their jobs, and went to management to explain away their actions. The Board notes as well that no one (including Mrs. Castaneda) who testified that they thought either Mr. Ragni or Mr. Perri were still employed could explain how it would make a difference to them if they were not. In light of the respondent's unequivocal response to the applicant's campaign from the beginning, the Board would be hard pressed to find that anyone could have been mistakenly viewed by employees as soliciting union signatures with the authority and support of the respondent.

49. It is the evidence of Linnett Demetrius which causes the Board the most concern. Her note says:

"To Mr. M. Elsayed -

On leaving work last evening around 7 P.M. I was harrassed [sic] by 3 men of the Union at the Bus Stop. One of the men threatened me and made an issue they knew me well and said when the Union came in I wouldn't have any chance to keep my job. I had my 2 children with me and they were quite scared. He pointed his finger at me and was quite determined I would loose [sic] my job."

The note, however, was written by Mrs. Demetrius' supervisor, and Mrs. Demetrius' own testimony was considerably different. She says she told the organizers that she had nothing to say to them, and one of them said: "I know you, and when we get inside there, you have no support". She told her supervisor that she thought from this he meant that she would lose her job. Mrs. Demetrius did not sign a card.

50. The broad disparity between the note and Mrs. Demetrius' oral evidence leaves the Board in doubt as to what it was that was said to Mrs. Demetrius. But even accepting Mrs. Demetrius' oral version, the conversation, while somewhat menacing, clearly falls short of supporting the conclusion that Mrs. Demetrius claims to have taken from it. In the circumstances, the Board is persuaded that this single statement as reported by Mrs. Demetrius is insufficient to cast doubt on the membership evidence filed by the applicant. (See also *Green Giant of Canada Ltd.*, [1973] OLRB Rep. June 376.)

51. A final point arising out of the respondent's evidence is the allegation that one of the employee-witnesses, Joyce Barclay, was threatened by Mr. Ragni after her first appearance at the Board. Ms. Barclay's evidence is that she was walking on the sidewalk beside the Hotel and observed Mr. Ragni and another man (Mr. Compton) organizing for the union. Mr. Compton began to approach her, but Mr. Ragni rushed over and told him not to because she was "one of those who go to Court to lie on him". A few minutes later Ms. Barclay came out of the bank and was standing on the sidewalk waiting for a ride when Mr. Ragni came over and said: "Go in there and tell them who is out there signing and I'll see what I get".

52. Mr. Ragni agrees that he said something close to the initial statement, as does Mr. Compton. He denies, however, approaching Ms. Barclay again. Mr. Compton supported Mr. Ragni in this regard, but given the unreasonableness of Mr. Compton denying that Ms. Barclay could have overheard the first comment, or that she could have gone in and out of the bank without him seeing her while he was busy soliciting other employees, his evidence is of limited value.

53. The Board concludes, based on Ms. Barclay's testimony, that a second incident did occur. Her evidence in general on the two days that she testified does, however, raise a question about both her perception and recollection of events, and the Board is not certain that it has before it an accurate account of what was said, in order to evaluate it. The Board will characterize the incident as one of indiscretion on the part of Mr. Ragni. While a matter of concern, the Board does not, however, find this indiscretion (and lack of candour) on the part of Mr. Ragni sufficient to alter the inferences which the Board concludes, on the preponderance of evidence, it must otherwise draw against the respondent on the issues material to these proceedings. This is not, in fact, the first occasion in the proceedings where the Board detected in the testimony of Mr. Ragni a lack of total candour. As indicated, the same can be said for Mr. Clarke, and to the extent he sought to support Mr. Clarke's testimony, Mr. Walker as well. In addition, the applicant's supporters were markedly youthful, and cannot be said to have conducted themselves with the utmost discretion at all times, for example, in persistently attempting to enter the Hotel premises, in almost game-like fashion, after being requested several times not to do so. There is no doubt that such conduct contributed to an ultimate escalation in the situation surrounding the applicant's campaign. But even apart from the legality of the respondent's "ban", it must be recalled that, with the exception of Mr. Clarke, all of the terminations (which, for Mr. Ragni, was for material purposes his layoff) *preceded* such indiscretions, as did, on the respondent's own evidence, the great bulk of the Hotel's security response.

54. The Board turns now to a more detailed consideration of the various security arrangements at issue in this case: the extra staff assigned to patrol inside the Hotel, the sign-in procedure, the cars outside the Hotel. The right of an owner to take steps for the adequate security and control of his premises is, of course, a *prima facie* incident of ownership, and not

one to be lightly interfered with by a labour relations tribunal. On the other hand, *none* of the measures complained of by the applicant were in effect prior to the emergence of the applicant's campaign, and, apart from a less than credible claim on the part of Mr. Elsayed, the respondent can scarcely argue that the measures adopted were inherently necessary to the normal operation of the hotel facility. The respondent, in fact, does not argue that. Rather, the justification primarily put forward is that the security measures were simply a response to what the respondent considered to be improper organizing activities by the applicant and its agents. The respondent, in other words, admits (as, on the evidence, it must) that all of the measures in dispute were designed in one way or another to restrict the organizing activities of the applicant, as they did. This does not necessarily make the respondent's conduct unlawful. What it does, rather, is bring squarely into issue the interpretation which the Board must give to section 56 of *The Labour Relations Act*.

55. Section 56 reads as follows:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

The striking aspect of this section is that on its face it makes no mention of anti-union motive or purpose. It simply uses the word "interfere", which, in normal parlance, could be taken to connote either intentional *or* unintentional conduct. As the Board commented in *Westinghouse*, [1980] OLRB Rep. April 577, at paragraph 54:

"...section 56 of the Act can be interpreted as prohibiting any employer action which has the effect of interfering with the representation of employees by a trade union regardless of whether or not an anti-union motive exists."

It would not matter, in that event, whether the employer could satisfy the Board of a legitimate business purpose for its conduct. But the Board has always had regard to industrial relations reality, and to the scheme of the Act as a whole, and has never interpreted the section in this manner. To do so would of course render meaningless the other specific provisions of the Act, such as section 58, which clearly require the finding of an anti-union motive. Any discharge of a union organizer, or perhaps of *any* employee during a campaign, for example, could be litigated successfully by a trade union under section 56, whether or not an anti-union motive could be shown under section 58. It is impossible to contemplate that section 56 creates that kind of an unfair labour practice. As the Board commented in *Ontario Banknote Ltd.*, (Board File No. 0590-80-U unreported):

5. The union's representatives argued, notwithstanding the clear evidence [of no anti-union motive] before the Board, that a discharge during a union campaign can have a chilling effect on the ability to organize. That is no doubt true. Other innocent factors, such as lay-offs

for good business reasons for a financial downturn might also have a negative impact on the fortunes of a union. As real as those concerns may be to a union, they are not matters which the provisions of the Act are designed to protect unions or employees against. They should, therefore, not be the basis of a complaint to this Board (*National Automatic Vending Co. Ltd.*, 63 CLLC ¶16,278 at p. 1162).

See also *Walker Brothers Quarries Limited*, [1980] OLRB Rep. July 1107, at paragraph 16. In the absence of an anti-union motive, in other words, it is not a violation of the section if the employer's conduct simply *affects* the trade union in pursuit of an unrelated business purpose. As the Board said in *A.A.S. Communications Ltd.*, [1976] OLRB Rep. Dec. 751, in commenting on this purposive meaning of the word "interfere":

31. The essential element in any complaint under section 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only *incidentally affects* a trade union. (emphasis added)

As has often been noted, however, the trade union will not in every case be required to prove by affirmative evidence the existence of an anti-union motive. This is so because the effect of certain types of conduct is so clearly foreseeable that an employer may be *presumed* to have intended the consequences of his acts: *A.A.S. Communications*, *supra*; *G. W. Martin Lumber*, [1980] OLRB Rep. May 737; *Bank Canadian National*, [1980] 1 Can. LRBR 470; *Radio Officers' Union v. NLRB*, (1954) 33 LRRM 2417. Once such conduct has been established, then as a practical matter (and whether or not section 79(4a) of the Act applies to the situation) the onus is upon the employer to come forward with a credible business purpose to justify the conduct (cf. *NLRB v. Great Dane Trailers*, (1967) 65 LRRM 2465). It is up to the Board then, in all the circumstances, to decide what the motive of the employer really was.

57. In the present case it is clear that all of the new security measures and controls were a response to the organizing activity of the applicant. According to Mr. Lyall, the instructions given to Intertec were to lead management "to any abnormal employee movements on the premises". Mr. Elsayed claimed that the purpose of the internal security was to prevent employees from being solicited while working. There was, however, evidence of no more than isolated incidents of such occurrences (none involving outside organizers), and no apparent reason why attempts were not first made to control this through the usual means of instructions to employees and monitoring by supervisors. The policy of Mr. Elsayed, in fact, seemed to be aimed at banning organizing altogether from the premises, whether on an employee's work-time or not. If this was the case, the respondent misconceived its legal rights in this regard. As the Board stated in *Consolidated Fastrate Limited*, [1980] OLRB Rep. April 418, at paragraph 15:

In assessing an allegedly illegal restriction on trade union activity, the Board begins with the premise that "working time is for work", and that time outside of working hours is an employee's time, to use as he wishes, without unreasonable restraint, even though he may be on company property.

58. The purpose put forward in the evidence for the external security was two-fold. The

evidence of the security officers made it clear that one of its purposes was to ensure that no one connected with the applicant's campaign, whether a professional organizer or a recently-discharged employee, entered the premises for any purpose. It is extremely difficult, however, to discern the business purpose behind such discrimination, bearing in mind that the facility which the respondent operates, unlike a production site, is open to virtually every other member of the public. There is no evidence from the respondent, for example, that Mr. Clarke and the other union organizers, when drinking at Diamond Lil's, were attempting to solicit members or otherwise distracting employees while the employees were supposed to be working. The total ban on anyone connected with the applicant appears to have been simply part of the respondent's resolve to "outlaw" union activity on its own premises, and to brand as outcasts those persons identified as being a part of the applicant's campaign.

59. The other purpose for the outside security, put forward by Mr. Elsayed himself, was to prevent harassment and provide an escort service to the bus-stop for employees who requested it. There was, however, no evidence that employees were ever made aware that that was its purpose, or ever made use of it in that way. In light of this, together with the placement of the Intertec car on the loading ramp immediately overlooking the employees' entrance, and the immediate intercession of a security officer if an organizer set foot on company property, the Board concludes that one of the purposes of the external patrols was to make patent to employees the closeness with which their movements were being monitored, in order to further discourage them from exercising their rights under the Act. The Board finds on the facts of this case, that all of the security measures adopted by the respondent in response to the applicant's organizing efforts were a violation of section 56 of the Act, and in overall impact, of section 61 as well.

60. Taking into account the sudden initiation of a sign-in procedure and religious enforcement of the "thirty-minute" rule, the ringing of the premises (inside and out) with security, the systematic termination of virtually everyone identified as an activist in the applicant's campaign (and even, it would appear, one person simply observed signing a card), and the various uncontradicted admissions of management, the Board is left with no doubt that a decision was made, for whatever reason, at the very highest levels of the respondent's organizations to squelch the applicant's campaign at all costs before it got off the ground. It would appear that the respondent, in large measure, has succeeded.

61. The applicant has requested, as the only remedy now capable of remedying the wrong done to it by the respondent, a certification under section 7a of the Act. That section reads:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

There is no doubt that the respondent has contravened the Act, and if ever there was a case where the true wishes of the employees are not likely to be ascertained by the conventional

means now available, this appears to be it. But does the applicant have “membership support adequate for the purposes of collective bargaining”? This condition was added in the 1975 amendments of *The Labour Relations Act* (S.O. 1975, c. 76). To gain some insight into its meaning, reference must be made to its predecessor section, which read:

7.-(4) If the Board is satisfied that more than 50 per cent of the employees in the bargaining unit are members of the trade union and that the true wishes of the employees are not likely to be disclosed by a representation vote, the Board may certify the trade union as bargaining agent without taking a representation vote.

In making this comparison, it becomes clear that the phrase “membership support adequate for collective bargaining” is not simply a reference to majority support. Were this the case, it would have made no sense to eliminate the explicit requirement for majority support already contained in section 7(4). Even more striking, however, is the removal of the words “by a representation vote” from section 7(4). By doing so, the Legislature appears to have clearly contemplated the application of the new section 7a, in appropriate cases, to situations where the applicant’s membership support fell even below the minimum level required in the statute for entitlement to a representation vote. (See also *Lorain Products*, [1977] OLRB Rep. Nov. 734.) The section could now apply, in other words, to situations where the employer’s response is so massive and so early as to prevent a trade union from ever attaining the level of support needed for a vote. This, as the Board has found, is precisely the case here. Had it not been for the unlawful interference of the respondent, the applicant might well have garnered the 35 per cent support it initially sought for the taking of a pre-hearing vote. As it is, the applicant can demonstrate the membership support of only 30% of the unit. Is 30% sufficient in this case? support of only 30% of the unit. Is 30% sufficient in this case?

62. The competing policy considerations which underlie a section such as section 7a are aptly set out by the British Columbia Labour Board in commenting on similar changes made to their own statute, in *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* [1974] 1 Can LRBR 13, at page 20:

...Certification without a vote...creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct. ...However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means. . . I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don’t want. Undoubtedly, the remedy must be carefully used...

As the above passage underscores, the true wishes of the employees are always the Board’s primary concern, and the remedy is not meant to be punitive. As well, where the support is not

there, the Board is scarcely placing the trade union in an enviable position by sending it off with a certificate. On the other hand, the Board must not hesitate to consider the provisions of section 7a when an employer's own conduct seriously impairs the Board's ability to ascertain with more certainty what the wishes of the employees are. As the B.C. Board went on to say in *Forano Limited*:

...the Board must not be afraid to use it when it appears appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really want collective bargaining but have been intimidated from choosing it openly. The only way they will get it is for the Board to certify the union...

63. These policy considerations are clearly reflected in our own section 7a. The "bright-line" test fixing a minimum level of support needed for certification is gone, and an employer who intervenes unlawfully takes his chances. On the other hand the Legislature has added the eminently practical *caveat* that the Board not certify unless the applicant trade union, in the opinion of the Board, has membership support adequate for the purposes of collective bargaining. What this will mean in terms of percentages must vary with the facts of each case, and no single catalogue of criteria can be laid down (see *Viceroy Construction Ltd.*, [1977] OLRB Rep. Sept. 562). It clearly will involve the Board in some measure of speculation. The duty of the Board to make this assessment only arises where the employer has intentionally destroyed the more reliable and conventional means of ascertaining employee wishes – and such speculation must be undertaken with care.

64. Having regard to the severity of the applicant's conduct in this case, and the early stage at which the respondent intervened, the Board is impressed by the fact that the applicant was still able to demonstrate, by signed cards, the commitment of 30 per cent of the unit. This to the Board suggests the strength of that commitment, and a substantial and workable "core" from which the applicant can muster additional support, once the opportunity for free collective bargaining has been put in place. There is, in addition, no evidence in the present case to suggest that the applicant's campaign had been anywhere close to being "spent" at the point that the respondent began its massive interference. Any inference, in fact, is to the contrary. In all of the circumstances of this particular case, the Board is of the opinion that the 30 per cent membership support demonstrated by the applicant constitutes "membership support adequate for the purposes of collective bargaining".

65. The Board therefore has a discretion whether or not to certify the applicant in this case. The applicant argues that, because of the time it was forced to spend in litigating all of the section 79 complaints, no other remedy is capable of placing it in the position it would have been in had the respondent not deliberately intervened to chill its campaign. The Board finds this argument to be persuasive. Even the most massive of access orders would not likely overcome the chilling effect of seven months of hearings on any momentum the applicant may have had. The alternative remedy assumes as well that the true wishes of employees could now be ascertained through the medium of card solicitation, and the Board, as noted, does not consider that this is the case. The pre-conditions of section 7a having been met, the Board finds that the respondent, by its deliberate conduct, has left the Board with no reasonable alternative but to exercise its discretion to grant a certificate to the applicant.

66. The Board therefore certifies the applicant, pursuant to the provisions of section 7a

of the Act, as bargaining agent for all employees of the respondent at the Skyline Hotel, Dixon Road, Etobicoke, save and except supervisors, persons above the rank of supervisor, office and sales staff, accounting staff, security staff, front desk staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered under subsisting collective agreements, being a unit which the Board finds to be appropriate for collective bargaining.

67. As well, the respondent appears to have done everything in its power to create amongst its employees the impression that the activities of the applicant, and employees' participation in those activities, are illegitimate forms of conduct. The respondent therefore is directed to grant to the applicant the same legitimacy the Board considers was granted to the Hotel Committee by permitting the applicant, without delay, to use one of the respondent's ballrooms, at no charge, for the purpose of convening meetings to address the employees in the unit. The meetings shall be two in number and scheduled by the applicant so that each employee in the unit has the opportunity at a non-working time to attend one of them. Each of the meetings shall not exceed three hours in length.

68. The respondent is also directed to sign and post a notice in the form attached as Appendix "A" in at least three conspicuous areas reserved for employees only. The notices are to remain posted for a period of sixty consecutive working days. The respondent is further directed to permit a representative of the applicant access to the same three areas for the purpose of posting notices of any meetings of employees to be held in connection with negotiations for a first collective agreement.

69. Finally, the respondent is directed to offer to reinstate forthwith Deborah Chevalier, Linda Hartery, Mark Clarke, Rick Walker, Frank Ragni, Randy Nichols and Adriana Colagiacomo, and to compensate each of them, together with Greg Kewley, for any loss of earnings suffered as a result of their unlawful terminations, with interest payable in accordance with the formula set out in *Hallowell House*, [1980] OLRB Rep. Jan. 35.

70. The Board will remain seized with this matter in the event a dispute over the implementation of its order.

DECISION OF BOARD MEMBER F. W. MURRAY:

1. I dissent.

2. While I agree with the majority regarding the unlawfulness of the terminations and the company's security responses, it is the granting of a certificate under section 7a with which I disagree.

3. While the conduct of the respondent cannot be defended, the majority's concern is clearly with the ability of the individual employees to now express their true wishes by signing cards. It seems to me unfortunate that the Board does not have proper authority to order the taking of a representation vote. This now does not appear to be within the Board's power under the present legislation.

4. Since the option is not, however, available to provide the Board with clear proof as to the true wishes of the employees, I would not have gone so far as to certify the applicant in

the present case where the only *certain* membership support the union has is the 30 per cent demonstrated by the signed cards submitted at the time of the making of the application.

5. I would not have concluded that this 30 per cent satisfies those provisions of section 7a dealing with membership support adequate for the purpose of collective bargaining. Accordingly, I would have attempted to redress the wrongs of the employer in some other way.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have posted this notice in compliance with an Order of The Ontario Labour Relations Board, issued after a series of hearings arising out of the efforts of Local 299, of the Hotel and Club Employees' Union to become the Collective Bargaining Agent for our employees. The Ontario Labour Relations Board found that we violated The Labour Relations Act by interfering with the rights of our employees to select a bargaining agent of their choice.

The Act gives all employees these rights:

To organize themselves,

To form, join and participate in the lawful activities of a trade union,

To act together for collective bargaining,

To refuse to do any and all of these things, if they wish.

We assure all of our employees that:

WE WILL NOT do anything to interfere with these lawful rights that all employees enjoy,

WE WILL NOT discriminate against any employees for participating in the lawful activities of the trade union, or for engaging in free collective bargaining with us through Local 299,

WE WILL offer to reinstate the following persons:

DEBORAH CHEVALIER, LINDA HARTERY, MARK CLARKE, RICK WALKER, FRANK RAGNI,
RANDY NICHOLS AND ADRIANA COLAGIACOMO.

WE SHALL pay these seven employees as well as GREG KEWLEY for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL bargain in good faith with Local 299 as the duly certified collective bargaining representative of our employees in the bargaining unit described below and make every reasonable effort to make a collective agreement.

The bargaining unit is:

All employees of Skyline Hotels Limited, Dixon Road, Etobicoke, save and except supervisors, persons above the rank of supervisor, office and sales staff, accounting staff, security staff, front desk staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered under subsisting collective agreements.

SKYLINE HOTELS LIMITED

Per:

General Manager

Dated: December 30, 1980

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0448-80-R Labourers' International Union of North America, Local 506, Applicant, v. **Trans-Nation Incorporated** and Valentine Enterprises Contracting, Respondents

Related Employer – Businesses under common control or direction – Whether businesses related – Relevant criteria considered

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and J. A. Ronson.

***APPEARANCES:** Chris G. Paliare and Peter Hitchen for the applicant; Adrian Hill for Trans-Nation Incorporated; and Robin B. Cumine, Q.C., and James Valentini for Valentine Enterprises Contracting*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; December 11, 1980

1. The names: "Trans-Nation Incorporated, Valentine Enterprises and Valentine Enterprises Contracting" appearing in the style of cause as the names of the respondents are amended to read "Trans-Nation Incorporated and Valentine Enterprises Contracting".

2. The applicant has applied to the Board for an order under section 1(4) of *The Labour Relations Act*. The applicant has alleged that Trans-Nation Incorporated and Valentine Enterprises Contracting ("Valentine") carried on associated or related activities or businesses under common control or direction. The applicant has requested a declaration that the respondents constitute one employer for the purpose of the Act and all relevant collective agreements. The applicant has also requested a declaration that Trans-Nation Incorporated is bound by all the terms and conditions of employment as those which bind Valentine with respect to employees for whom the applicant has bargaining rights. The respondents have denied that they are under common direction or control.

3. Trans-Nation Incorporated was incorporated under The Corporations Act of Ontario by Letters Patent dated April 27, 1964, under the name Trans-Nation Land Corporation (Toronto) Limited. This name was changed by articles of amendment dated October 3, 1974, to Trans-Nation Incorporated. By articles of amalgamation effective December 14, 1978, Trans-Nation Incorporated was amalgamated with 399038 Ontario Limited to continue as one corporation under the name Trans-Nation Incorporated ("Trans-Nation"). Trans-Nation Land Corporation (Toronto) Limited was originally a private corporation and became a public corporation in 1969. Trans-Nation reverted to a private corporation on September 6, 1979, by an order of the Supreme Court of Ontario.

4. John Franciotti is the secretary-treasurer and a director of Trans-Nation. He gave evidence that for the past fifteen years Trans-Nation has been acquiring commercial and other buildings in Toronto. Trans-Nation has refurbished these buildings and has become a landlord of these buildings. This work has been Mr. Franciotti's full-time occupation and in carrying out such acquisition and refurbishing, Trans-Nation has employed managers and office staff. The work of refurbishing has been accomplished by the use of subcontractors. In the past, Mr. Franciotti has also operated restaurants, bars and discotheques. He was an original shareholder in Trans-Nation and late in 1978 he acquired additional shares. At that time Mr. Franciotti became an officer and director in Trans-Nation and presently has voting

control of 502,000, or half of Trans-Nation's shares, through a family trust. Mr. Franciotti exercises day to day control over the business activities of Trans-Nation. The other half of Trans-Nation's shares are owned by Emilio Valentini, James Valentini, Morris Prychidny and William Robinson. Emilio Valentini owns twenty-five per cent of the shares, James Valentini owns fifteen per cent of the shares and the remaining ten per cent of the shares are owned by Morris Prychidny and William Robinson.

5. Emilio Valentini is the president of Trans-Nation and has been the president of Trans-Nation and Trans-Nation Land Corporation (Toronto) Limited since 1964. Emilio Valentini and his brother James Valentini are directors of Trans-Nation. Valentine is a limited partnership pursuant to The Limited Partnerships Act of Ontario. The partners in Valentine are a trust, Milio Trust, and Valentine Enterprises Contracting Limited. The trust has a ninety per cent interest in Valentine, and Valentine Enterprises Contracting Limited has a ten per cent interest in Valentine and is the managing partner. Emilio Valentini has a sixty-five per cent beneficial interest in the trust and James Valentini has a thirty-five per cent beneficial interest in the trust. Emilio Valentini owns sixty-five per cent of the shares in Valentine Enterprises Contracting Limited and James Valentini owns the remaining thirty-five per cent of the shares in that corporation.

6. Mr. Franciotti exercises control over day to day operations of Trans-Nation and has divested himself of most of the commercial buildings that he was formerly involved in. During October of 1979 Trans-Nation purchased the King Edward Hotel in Toronto for \$6.3 million. It is the intention of Trans-Nation to refurbish and open the hotel in March of 1981. Trans-Nation has hired architectural and design consultants and commencing in November 1979 a series of contractors have been engaged to perform the renovation and refurbishing of the hotel. This work includes knocking out some walls and reconstructing other walls. The size of some rooms is being changed and decorative changes are being made to the dining rooms.

7. Trans-Nation had employed James Devereaux as a general manager for the past ten years. Mr. Devereaux, who left the employ of Trans-Nation prior to the hearing of this application, hired a project manager, Bert Redfern, for the refurbishing of the hotel, secretarial personnel and a security man on the door. In addition, Trans-Nation took over the employment of four stationery engineers who had worked for the hotel prior to its sale. Trans-Nation has abided by the terms of an existing collective agreement covering the stationery engineers and has entered into a new collective agreement covering the stationery engineers. Mr. Franciotti has an office in the hotel and the project manager and secretarial personnel work out of the hotel.

8. The work of refurbishing the hotel is being performed, or will be performed, by contractors whose employees are represented by trade unions and by contractors whose employees are not represented by trade unions. Approximately eighty per cent of the work being performed at the hotel is being performed by employees who are represented by trade unions. The decisions with respect to the refurbishing of the hotel are made by Mr. Franciotti and Emilio Valentini and are supervised by Mr. Redfern.

9. Valentine has been in operation since 1962 and has operated in Toronto and in Ontario generally. Valentine performs principally sewer and watermain work with some onsite servicing work. James Valentini is in charge of Valentine's operations and its labour relations. Emilio Valentini has not been involved in Valentine's operations for many years. There are

three limited partnerships which are active. Valentine Realty Limited owns and sells land. Valentine Development Limited looks after developing land and Valentine Enterprises Contracting Limited performs the construction work. Valentine has never operated a hotel and James Valentini has not worked at the King Edward Hotel. However, Mr. Franciotti and Emilio Valentini are equal partners in the Essex Hotel in Toronto. Adjacent to the hotel approximately nineteen townhouses were being built on property which was apparently owned by Trans-Nation. The townhouses were being built by Valentine Developments Limited and will ultimately be owned and sold by Trans-Nation. A billboard in front of the townhouses carried the sign "A project by Trans-Nation".

10. None of Valentine's equipment or employees have been used at the hotel. Valentine has its office at 451 Atwell Drive in Rexdale and does not have an office at the hotel. Trans-Nation has an office at the hotel which it uses and has its head office at 451 Atwell Drive in Rexdale. Apparently, Trans-Nation does not use the office in Rexdale. While Trans-Nation uses a bank near the hotel, its funds are transferred to a bank in Mississauga. Valentine uses the same bank in Mississauga.

11. In January of this year, Nikolas Habermel was hired as an employee of one of Trans-Nation's subcontractors, Berkley Mechanical Contracting ("Berkley"), at the King Edward Hotel. Mr. Habermel became involved in disagreements with various persons at the hotel when he attempted to sign employees of some of the subcontractors as members of the applicant. These disagreements led to his dismissal from the employment of Berkley. There had been other areas of friction between Mr. Habermel and Berkley with respect to apprentices. It appears that Berkley was unable or unwilling to reinstate Mr. Habermel to his former position. A series of complaints were filed on Mr. Habermel's behalf under section 79 of the Act. These complaints were settled upon the payment of a sum of money to him by Trans-Nation and by hiring him as a labourer in Trans-Nation's employment. Trans-Nation adopted this course of action in order to restore harmony in labour relations to the King Edward Hotel. In this way, Mr. Habermel became the only labourer employed by Trans-Nation at that hotel.

12. In April of this year Mr. Habermel made a complaint to the Health and Safety Branch of the Ministry of Labour concerning the health and safety conditions of the hotel. It was alleged that Mr. Habermel was isolated from other employees and transferred to the townhouses to sweep up at that site. A further complaint was filed under section 79 of the Act which alleged violations of the Act and of *The Occupational Health and Safety Act, 1978*. The complaint was settled by the agreement of the parties which provided for the reinstatement of Mr. Habermel together with the payment of compensation and an undertaking by Trans-Nation to cease and desist from coercing and/or intimidating its employees from exercising their rights under *The Labour Relations Act* and *The Occupational Health and Safety Act, 1978*.

13. On April 9 of this year Mr. Habermel was informed by a man known as Walter that he was to be transferred to the townhouses effective the next day. Walter gave Mr. Habermel a piece of paper on which was written, "199 Mutual Street, Phil French. 8 o'clock". Mr. Habermel reported for work in accordance with the directions on the piece of paper. He located Mr. Finch, who was expecting him, and was referred to a foreman who assigned him to general clean-up work. Mr. Habermel was laid off by Valentine on April 22 of this year and received a separation slip for unemployment insurance purposes from Valentine. On April 9, when he was transferred from the King Edward Hotel, Mr. Habermel was unaware that he was becoming an employee of Valentine. He was paid for his work at the townhouses by Valentine

and for his work at the King Edward Hotel by Trans-Nation during the time he was an employee of Trans-Nation.

14. In the *Walters Lithographing Company Limited* case, [1971] OLRB Rep. July 406, the Board referred to certain criteria to be considered in determining whether two or more entities should be treated as constituting one employer for the purposes of the Act:

The *indicia* or criteria which the Board considers relevant in making a determination as to whether the activities or businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are – (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. . .

15. The question of common ownership or financial control shows that Emilio and James ownership or financial control shows that Emilio and James Valentini own and control Valentine. In addition, Emilio and James Valentini own forty per cent of the shares of Trans-Nation. Emilio Valentini is the president of Trans-Nation and Emilio and James Valentini are directors of Trans-Nation. With respect to the question of common management, the evidence establishes that Mr. Franciotti and Emilio Valentini manage the day to day operations of Trans-Nation with respect to refurbishing the King Edward Hotel. On the other hand, the management of Valentine is conducted by James Valentini. There is some evidence of an interrelationship of operations in the construction of the townhouses on Mutual Street in Toronto. In addition, Valentine and Trans-Nation in theory, at least, have their head offices at the same address. There is no evidence that there is any representation to the public as a single integrated enterprise. It is with respect to the centralized control of labour relations that Valentine and Trans-Nation quite clearly appear to be under common direction and control. Mr. Habermel became an employee of Trans-Nation under unusual circumstances as part of a settlement of another employer's violations of the Act. The motives for the employment of Mr. Habermel as a labourer by Trans-Nation were clearly for the purpose of attempting to preserve harmonious labour relations at the hotel. However, notwithstanding the origin of Mr. Habermel's employment by Trans-Nation, the ease with which he became an employee of Valentine when it suited Trans-Nation's purposes indicates a centralized control of labour relations. The evidence indicates that Mr. Franciotti, James Valentini and Mr. Habermel were unaware of the transfer of Mr. Habermel from Trans-Nation to Valentine until some time after it had occurred. The transfer was apparently arranged by the middle-management of Trans-Nation and Valentine.

16. In considering the criteria set forth in the *Walters Lithographing Company Limited* case, *supra*, the Board is prepared to assume for the purpose of argument, without so deciding, that Trans-Nation and Valentine are under common control or direction. However, before the Board may exercise its discretion under section 1(4) of the Act, there are three conditions which must be found to exist. In addition to the obvious requirement that there be more than one corporation, individual, firm, syndicate or association involved in the application, there is the requirement that these business entities be both "associated or related" and under "common control or direction". As the Board stated in the *Diversey (Canada) Limited and Diversey Environmental Products Limited* case, [1978] OLRB Rep. Sept. 814 at 817:

The need for these latter two requirements is not difficult to understand. Section 1(4) allows the Board to pierce the corporate veil in order to avoid the types of situations outlined in *Industrial Mine*. It is not designed to bind independent or unrelated enterprises. In deciding whether the statutory prerequisites have been satisfied, the Board has regard to a broad range of industrial relations considerations, some of which may overlap in their relevance to the various issues, and all of which may vary in importance depending upon the particular fact situation at hand.

17. The question of whether Trans-Nation and Valentine are “associated or related” requires the Board to consider the nature of their business activities. Trans-Nation is engaged in the acquisition, refurbishing through subcontractors, leasing and sale of commercial land and buildings. Valentine is almost entirely engaged in sewer and watermain work. As the Board stated in the *Brant Erecting and Hoisting* case, [1980] OLRB Rep. July 945, businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and are carried on for the benefit of related principals. It is clear that Trans-Nation and Valentine are neither of the same character nor serve the same general market. In addition, Trans-Nation and Valentine do not employ the same mode and means of production. The employment of Mr. Habermel by Valentine as a labourer utilized skills which some of Valentine’s employees would exercise from time to time. On the other hand, Mr. Habermel’s employment by Trans-Nation was fortuitous and the skills he exercised as an employee of Trans-Nation were totally unlike the skills exercised by the other employees of Trans-Nation. In the opinion of the Board, Trans-Nation and Valentine are not carrying on associated or related activities or businesses within the meaning of section 1(4) of the Act.

18. We find that Trans-Nation and Valentine are not associated or related, and, accordingly, that they may not be treated as one employer. It therefore follows that the applicant is not entitled to a declaration that Trans-Nation is bound by all the terms and conditions of employment as those which bind Valentine with respect to employees for whom the applicant has bargaining rights.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent. I disagree with the majority view that one of the two companies under common control, to the very great extent that Trans-Nation Incorporated and Valentine Enterprises Contracting Ltd. are under common control, can operate in the construction business independent of any collective bargaining responsibilities which the other might have to a construction industry trade union.

2. Section 1(4) of the Act gives the Board a discretion to declare that two businesses are one employer for the purpose of all relevant collective agreements where those two businesses are related and under common control. The section provides:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade

union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. The majority have assumed for the purposes of argument that Trans-Nation and Valentine were under common control. This was the only reasonable view to take. Emilio and James Valentini, who own and control Valentine, also hold forty per cent of the shares of Trans-Nation; both businesses have the same head office; and they jointly developed a townhouse project. But perhaps the best example of the extent of common control of these two enterprises is provided by the case of Mr. Habermel. This employee was discharged, allegedly for union activity, by one of Trans-Nation's subcontractors. As part of the settlement of Mr. Habermel's section 79 complaint against the subcontractor, Trans-Nation hired him. After complaining of violations of *The Occupational Health and Safety Act, 1978* by Trans-Nation, Mr. Habermel was transferred from the hotel work site to the townhouse work site and into the employment of Valentine. In paragraph 15 the majority notes that "the ease with which he became an employee of Valentine when it suited Trans-Nation's purposes indicates a centralized control of labour relations".

4. The majority declined to find that the businesses were related. On this point, counsel for the applicant trade union directed our attention to *Elmont Construction Ltd.*, 74 CLLC ¶16,115 where the Board found two firms to be related even though their principal concerns were different. On the authority of this case, I would have said that Trans-Nation and Valentine were not unrelated merely because one is primarily engaged in refurbishing while the other is primarily "engaged in sewer and watermain work", since "general contracting" is included in their statement of business activity in their registration under *The Corporations Information Act, 1976*, S.O. 1976, c. 66. Some of the jobs these companies perform in the construction industry are the same. And there is no doubt that they are carried out for the benefit of related principals. For these reasons, I would have found Trans-Nation and Valentine to be related.

5. In the result I would have declared that the respondents constituted one employer for the purposes of the Act and all relevant collective agreements.

0176-80-R Ontario Association of Weight Counsellors, Applicant, v. Weight Loss Inc., Respondent.

Bargaining Unit – Practice and Procedure – Board issuing interim certificate – Employer seeking exclusions from unit on certain grounds – Employer seeking to change grounds for exclusions after examiner’s hearings completed

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *B. P. Bellmore for the applicant; W. J. McNaughton and M. Langille for the respondent.*

DECISION OF THE BOARD; December 1, 1980

1. By decision dated June 6, 1980, another panel of the Board certified the applicant under section 6(1a) of *The Labour Relations Act* as the bargaining agent for a bargaining unit at Hamilton as described therein, pending final resolution of the composition of the bargaining unit. In that decision the Board described the dispute between the parties with respect to the Hamilton and London bargaining units as follows:

“11. There was disagreement between the parties as to exemptions from the bargaining unit claimed by the respondent. The latter seeks to exclude Area Director, Assistant Area Director, office and sales staff and persons regularly employed for not more than 24 hours per week. The applicant agrees to the exclusion of Director, but objects to the exclusion of certain persons as ‘sales staff’ and 24-hour people. the respondent has persons regularly employed for not more than 24 hours per week and the Board grants the request for their exclusion from the units of full-time employees.

12. The persons whose status is in dispute are Sarah C. Bethune, classified as Assistant Director, employed at Hamilton, whose exclusion is sought under section 1(3)(b) of the Act, and Sandar [sic] L. McGlynn-McVey, whose exclusion is sought on the grounds that she is a sales person. She is employed at London. A third exclusion was sought for Ricky Wraight as a sales person employed at Burlington. Wraight, however, is in the group of employees regularly employed for not more than 24 hours per week. This group does not have sufficient membership to entitle it to certification or a vote in any event, so that the request need not be inquired into further.

13. Accordingly, the Board appoints Ms. B. McLean, Labour Relations Officer, to inquire into the duties and responsibilities of Sarah C. Bethune and Sandra L. McGlynn-McVey, and report to the Board thereon.

. . . .

20. The final disposition of the application with respect to the employees at London must await the outcome of the report of the Labour

Relations Officer with respect to the duties and responsibilities of Sandra L. McGlynn-McVey.”

2. By letter dated June 19, 1980, counsel for the respondent advised the Registrar as follows:

“Re: Ontario Association of Weight Counsellors and Weight Loss Inc.
– Board File No. 0176-80-R

We are in receipt of the Decision of the Ontario Labour Relations Board in the above matter. There appears to be a clerical error in paragraphs 11, 15 and 17 and the Board’s Certificate for the Burlington location. The paragraphs and the Certificate both have the exclusion as the ‘Area Director, Assistant Area Director,’. The exclusion, I believe ought to read ‘Director, Assistant Director,’ which would be in line with the agreement of the parties, and in line with the Board’s statement in paragraph 11, ‘The applicant agrees to the exclusion of Director.’

Would you kindly forward the corrected Decision and Certificate at your earliest convenience.”

3. It is common ground between the parties that the exclusion intended by them was “Clinic Director” rather than “Area Director”, as confirmed by a written Agreement dated November 18, 1980, which was filed with the Board on November 20, 1980 by counsel for the respondent. Accordingly, paragraphs 11, 15 and 17 of the aforementioned decision and the Certificate (for Burlington) dated June 6, 1980 issued pursuant to paragraph 19 of that decision are hereby amended to read “Clinic Director” instead of “Area Director” wherever the latter appears therein. The present decision will also, of course, reflect that Agreement.

4. The report of the Labour Relations Officer reads in part as follows:

“Pursuant to my appointment as Labour Relations Officer, authorized to inquire into the duties and responsibilities of Sarah C. Bethune and Sandra L. McGlynn-McVey, and to report to the Board thereon, I convened a meeting of the parties in Hamilton on Tuesday, June 24 and in London on Wednesday, June 25, 1980.

Present and representing the parties were:

For the Applicant

Mr. Weir Milne
Ms. Lucy Morton

Counsel
Employee and President of the
Trade Union

For the Respondent

Mr. Steve Harrington	Counsel
Ms. Erica Foote	Area Director

The positions of the parties with respect to the two challenged positions are as follows:

The Respondent seeks the exclusion of Sarah Bethune (Assistant-Director, Hamilton), on the basis of the managerial and confidential (with respect to labour relations) aspects of her duties and responsibilities as per section 1(3)(b) of the Labour Relations Act. The Applicant however, seeks Ms. Bethune's inclusion into the bargaining unit on the basis of her employees status.

The Respondent seeks the exclusion of Sandra L. McGlynn-McVey (Consultant, London), on the grounds that she is employed in a 'sales' capacity. Conversely, it is the Applicant's position that Ms. McGlynn-McVey is not employed as a 'sales' person and should properly be included in the proposed bargaining unit.

Following the examination of Sarah Bethune, the Applicant called one witness in reply – namely;

Ms. Lois Davidson	Director, Hamilton Clinic
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The parties were afforded full opportunity to be heard to examine and cross-examine witnesses and to introduce evidence bearing on the issues before me.

Dated at TORONTO this 25th day of July, 1980.

(signed)	"B. McLean"
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B. McLean,
Labour Relations Officer"

A copy of that report was forwarded to the parties together with Form 11 on July 25, 1980.

5. On August 5, 1980, the Board received a registered letter from counsel for the respondent which included the following:

"

Please be advised that it was the Respondent's position at the original hearing and was the Respondent's position at the time of the examinations that with regard to Sarah Bethune, the exclusion was sought both with regard to the managerial and confidential aspects of her duties (Section 1(3)(b) and on the basis that she lacks a community of interest with the other employees.

Please be advised that the Respondent requests a hearing to make representations on the conclusions the Board should reach in view of the Report. On behalf of the Respondent, we undertake to appear at a hearing in the above matter.

....”

Counsel for the applicant was not provided with a copy of that letter.

6. At the hearing before this panel of the Board on November 14, 1980 held at the request of counsel for the respondent for the purpose of hearing the oral representations of the parties as to the conclusions which the Board should reach in view of the aforementioned report, counsel for the respondent candidly conceded that the respondent is “on shaky ground” with respect to its contention that Ms. Bethune “exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations” within the meaning of section 1(3)(b) of the Act. Thus, the main thrust of his argument was that Ms. Bethune should be excluded from the Hamilton bargaining unit as, in his submission, she is employed in a “sales” capacity and does not share a community of interest with the other employees in that bargaining unit.

7. Counsel for the applicant submitted that the issue before this panel with respect to Ms. Bethune’s inclusion in or exclusion from the bargaining unit was defined by the previous panel in paragraph 12 of its decision dated June 6, 1890 as set forth above. Accordingly, he contended that unless counsel for the respondent could satisfy the Board that the functions performed by Ms. Bethune are within the ambit of section 1(3)(b), she must be included in the bargaining unit. Thus, it was his position that the applicant was precluded from converting the issue with respect to Ms. Bethune from a section 1(3)(b) issue to a community of interest issue.

8. Having regard to the submissions of the parties with respect to this matter, the Board is of the view that in the circumstances of this case, Ms. Bethune must be included in the bargaining unit unless the Board is of the opinion on the basis of the Labour Relations Officer’s report that she exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. The delineation of the scope of the issues to be inquired into and reported on by a Board Officer is not merely a technical matter. If that process is to be viable, it is essential that the Officer and the parties appearing before the Officer know with certainty in advance of the examination the precise scope of the issues which are to be dealt with; otherwise, it would not be possible for the representatives of the respective parties to properly prepare for and participate in the examination process. Thus, principles of fairness and natural justice require that each party know a reasonable time prior to the examination the nature and scope of the issue or issues to which the examination will pertain. A number of the questions asked by a Board Officer in an examination in which section 1(3)(b) is in issue are different than those asked in an examination in which the issue is that of community of interest. Furthermore, the questions asked and additional evidence introduced by the respective parties could also differ materially depending upon which of those matters was in issue. Indeed, the respective questions put to Ms. Bethune by the representative of the applicant and the representative of the respondent following her initial examination by the Labour Relations Officer confirm that the representatives of both parties understood the issue with respect to the inclusion or exclusion of Ms. Bethune to be confined to section 1(3)(b).

9. If it was the respondent's position at the original hearing that the exclusion of Ms. Bethune was sought both on the basis of section 1(3)(b) and on the basis that she lacks a community of interest with the other employees at Hamilton, it was open to counsel for the respondent to notify the Board *prior* to the examination that the Board's decision of June 6, 1980 did not in his view accurately reflect the respondent's position. It is apparent from the aforementioned letter dated June 19, 1980 that counsel for the respondent was aware that a letter is an appropriate vehicle by which to notify the Board that a portion of a decision does not accurately reflect a particular position asserted or agreed upon at the Board hearing which preceded the decision.

10. For the foregoing reasons, the Board concludes that the only issue properly before it with respect to Ms. Bethune is whether or not she should be excluded from the bargaining unit under section 1(3)(b) of the Act.

[Reasons for finding that Ms. Bethune is not excluded under section 1(3)(b) omitted]

• • •

15. As noted above, the respondent contends that Sandra L. McGlynn-McVey, who is employed by the respondent in London as a "Consultant", should be excluded from the London bargaining unit on the grounds that she is a "sales" person who comes within the "office and sales staff" exclusion.

16. The respondent's London operation is a clinic which assists overweight persons in reducing their weight through nutritional guidance and counselling. As of April 25, 1980, the date of this application, the respondent employed five persons at London the Clinic Director, Ms. McGlynn-McVey (hereinafter referred to as the "Consultant") and three nurses. When a prospective client telephones the clinic, the Consultant, the Clinic Director or one of the nurses ("Whoever gets to the phone first") answers and attempts to arrange for an appointment (referred to as a "consultation") for the person. Consultations were described by the Consultant in the following words: "That's when you bring someone in who is interested in the programme and explain it to them, tell them all about it and what we're doing here and hope that they'll join the programme during the clinic." Three-quarters of the consultations are done by the Clinic Director with the remaining quarter being done by the Consultant. The Consultant devotes approximately 25% of her total working time to consultations. About one-third of the Consultant's working time is devoted to telephoning and mailing letters and brochures to "NSR's" ("No Sale Returns"), who are persons who have attended at the clinic to hear about the programme but have decided not to join. Those calls, brochures and letters are part of the respondent's sales programme and are designed "to try to get the people back in and join the programme". The remainder of the Consultant's working time is spent doing office work such as re-booking appointments which clients have either cancelled or failed to attend (which accounts for approximately 20% of her working time); preparing bank deposits and balance sheets, attending at the bank to "pick up the receipts" and to make deposits, and sending receipts and other information to "Home Office" (which accounts for 5 to 10% of her working time); and "covering for the nurses" by taking a client "in for a daily". Ms. McGlynn-McVey provided the following explanation of a "daily": "Our clients come in on a daily basis for the weight loss period of their programme. So if the nurses - we do have three nurses - but if they're very busy, if we have a lot of clients waiting, then I'll take them in and that's just getting them weighed, giving them their vitamin, finding out how they're doing in the programme..." It was her evidence that she spends only about 5% of her time covering for the nurses.

17. The Consultant receives a base salary plus a bonus for each consultation which

results in a client joining the program. The bonus is \$3.00 for each person who joins the programme and elects to pay by instalments, and \$5.00 for each person who joins the programme and pays the full cost in advance. By way of contrast, the nurses (whose responsibilities include taking patients' medical histories, giving classes to patients and meeting with clients for their "dailies") receive a higher base salary than the Consultant but do not receive bonuses with the exception of the minimal sums which they receive for "extensions" (clients who, after having gone through their programmes, decide to extend their programmes for a further period).

18. Thus, the evidence as a whole discloses that, although there is some overlapping of duties and responsibilities as might be expected in this relatively small operation, the Consultant spends the vast majority of her time performing sales and office functions which are separate and distinct from the functions for which the nurses are responsible. Accordingly, having regard to all the evidence and the submissions of the parties, the Board finds that Sandra L. McGlynn-McVey is within the purview of the "office and sales staff" exclusion and is, therefore, excluded from the London bargaining unit which is described as follows:

All employees of the respondent at London, save and except Clinic Director, persons above the rank of Clinic Director, office and sales staff and persons regularly employed for not more than 24 hours per week (hereinafter referred to as "bargaining unit #2").

• • •

20. A formal certificate will now issue the applicant with respect to bargaining unit #1. [All employees of the respondent at Hamilton, save and except Clinic Director, persons above the rank of Clinic Director, office and sales staff and persons regularly employed for not more than 24 hours per week (to as #1").]

21. A certificate will issue to the applicant with respect to bargaining unit #2.

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APPLICATIONS DISPOSED BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1980

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1386-79-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. RCA Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101, (Intervener) v. Group of Employees, (Objectors).

Unit #1: "all office, clerical and technical employees of the respondent employed at Midland, save and except Foremen and Administrators, persons above the rank of Foreman and Administrator, professional engineers, Secretary to the Plant Manager, Secretary to the Industrial Relations Manager, Secretary to the Manager of Financial Operations, Secretary to the Manager of Quality and Reliability, Field Engineer, plant medical staff, students employed during the school vacation periods, students employed during co-operative work terms, and persons covered by existing collective agreements." (82 employees in the unit).

Unit #2: (*See Certifications Dismissed - No Vote Conducted*).

1469-79-R: International Union of Operating Engineers, Local 793, (Applicant) v. Corporation of the Town of Meaford, (Respondent).

Unit: "all employees of the respondent working in the Town of Meaford, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in the unit).

0006-80-R: Local 756 of the Hotel and Restaurant Employees Union, (Applicant) v. Corktown Tavern Limited, carrying on business as The Corktown Tavern, (Respondent).

Unit #1: "all employees of the respondent in Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours a week and students employed during school vacation period." (8 employees in the unit).

Unit #2: (*See Certification Dismissed - No Vote Conducted*)

0036-80-R: Ontario Nurses' Association, (Applicant) v. The Regional Municipality of Halton, (Respondent).

Unit #: "all registered and graduate nurses employed in a nursing capacity by the Regional Municipality of Halton, at Halton Centennial Manor in Milton, Ontario, save and except the Assistant Director of Nursing, persons above the rank of Assistant Director of Nursing and persons regularly employed for not more than 24 hours per week." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses regularly employed for not more than 24 hours per week in a nursing capacity by the Regional Municipality of Halton, at Halton Centennial Manor in Milton, Ontario, save and except the Assistant Director of Nursing, and persons above the rank of Assistant Director of Nursing." (7 employees in the unit). (*Having regard to the further such agreement of the parties*).

0122-80-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Jean-Marc Lalonde Limited, carrying on business as Marché Lalonde, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Alfred, Ontario, save and except store managers, persons above the rank of store manager, corporate officers, meat department manager, office staff, persons regularly employed during the school vacation period." (31 employees in the unit). (*Having regard to the agreement of the parties*).

0123-80-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant v. Jean-Marc Lalonde Limited, carrying on business as Marché Lalonde, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Alfred, Ontario, regularly employed for not more than twenty-four hours a week and students employed during the school vacation period, save and except store managers, persons above the rank of store manager, corporate officer, meat department manager, and office staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0433-80-R: Service Employees International Union Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. Trent Valley Lodge Ltd., (Respondent).

Unit: "all registered and graduate nurses of the respondent employed at Trent Valley Lodge Nursing Home in Trenton, Ontario, save and except head nurse and persons above the rank of head nurse." (3 employees in the unit).

0493-80-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Aztec Steel Manufacturing Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, drafting, engineering and other technical staff and students employed during the school vacation period." (84 employees in the unit).

0795-80-R: Seafarers' International Union of Canada AFL-CIO-CLC, (Applicant) v. Royal Hydrofoil Cruises (Canada) Limited, (Respondent).

Unit: "all employees of Royal Hydrofoil Cruises (Canada) Limited working aboard its passenger hydrofoil service operating between Toronto and Niagara-on-the-Lake, Ontario save and except Captains, Mates, Engineers, 'management', office and sales staff, ticketing and reservation clerks, students employed during the school vacation period and persons employed for not more than 24 hours per week." (40 employees in the unit). (*Clarity Note*).

1067-80-R: Retail, Wholesale and Department Store Union, AFL: CIO: CLC, (Applicant) v. Stedmans, Division of MacLeod-Stedman Inc., (Respondent).

Unit #1: "all employees of the respondent at Cochrane, Ontario, save and except Managers, persons above the rank of Manager, Office Staff, persons regularly employed for not more than 24 hours per week." (11 employees in the unit).

Unit #2: (*See Certification Dismissed - No Vote Conducted*).

1080-80-R: Service Employees International Union, Local 183, A.F. of L., C.I.O., C.L.C., (Applicant) v. The Village Green Nursing Home Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Selby, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed

during the school vacation period.” (employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Certification Dismissed - No Vote Conducted*).

1093-80-R International Union of Operating Engineers, Local 793, (Applicant) v. D.L. Stephens Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers, and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (24 employees in the unit).

1120-80-R Ontario Public Service Employees Union, (Applicant) v. The Salvation Army Sheltered Workshop, (Respondent).

Unit: “all employees of the respondent employed in the Municipality of Metropolitan Toronto, save and except head of counselling, senior work supervisor, persons above the rank of head of counselling and senior work supervisor, bookkeeper, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (14 employees in the unit) (*Having regard to the agreement of the parties*). (*Clarity Note*).

1154-80-R: United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Textile Trim Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Town of Delhi, Ontario, save and except forepersons, persons above the rank of foreperson, and office and sales staff,” (19 employees in the unit). (*Having regard to the agreement of the parties*).

1217-80-R: International Union of Electrical, Radio and Machine Workers, (Applicant) v. Granada TV Rental Limited, (Respondent).

Unit: “all employees of the respondent in the City of Ottawa, save and except Branch manager, persons above the rank of Branch manager, office, clerical, legal-collection, and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (8 employees in the unit).

1220-80-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, (Applicant) v. Siegfried Krieser Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent at its plant at 41 Colville Road in the Municipality of Metropolitan Toronto known as Metal Bending & Furniture Company, save and except foremen, persons above that rank, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week.” (52 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at its plant complex on Fenmar Drive in the Municipality of Metropolitan Toronto, save and except foremen, persons above that rank, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week.” (59 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1244-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers, (Applicant) v. Pepsi-Cola Bottling Company of Ottawa, Division of Pepsi-Cola Canada Ltd., (Respondent).

Unit: "all employees of the respondent performing the function of equipment servicemen, in the City of Ottawa, save and except sales supervisors, route managers, foremen, persons above those ranks, office staff, merchandisers and telephone sales persons, and those persons referred to in the collective agreement made between the respondent January 1, 1980, and the Employees' Association of Pepsi-Cola of Canada Ltd. (Ottawa)." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1253-80-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, (Applicant) v. Bytown Lumber Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Gloucester, save and except floor and sales manager, persons above that rank, office staff, persons employed for not more than 24 hours per week, students employed during the school vacation period, gate supervisor, and persons covered by the subsisting collective agreement between the applicant and the respondent." (8 employees in the unit).

1333-80-R: Labourers' International Union of North America, Local 247, (Applicant) v. W.D. Laflamme Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen and persons above except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1335-80-R: Canadian Union of Public Employees, (Applicant) v. Labelle Bus Lines Ltd., (Respondent). (Respondent).

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week, save and except the manager and persons above the rank of manager." (15 employees in the unit).

1364-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Mohawk Construction Limited, (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1392-80-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. The Corporation of the County of Simcoe, Simcoe Manor Home for the Aged, (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Beeton, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff." (24 employees in the unit). (*Having regard to the agreement of the parties*).

1396-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Turnco Corporation, (Respondents) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Blenheim, save and except foremen, persons above the rank of foreman, office and sales staff.” (30 employees in the unit).

1401-80-R: Christian Labour Association of Canada, (Applicant) v. Broadway Manor Nursing Home, (Respondent).

Unit: “all employees of the respondent at Paris, Ontario, save and except activity director, supervisors, persons above the rank of activity director or supervisor, registered nurses and office staff.” (30 employees in the unit). (*Having regard to the agreement of the parties*).

1402-80-R: Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL-CIO—CLC, (Applicant) v. Corporation of the County of Huron (Huronview Home for the Aged), (Respondent).

Unit: “all employees of the respondent employed at the Huronview Home for the Aged in Clinton, for not more than 24 hours per week, and students employed during school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements.” (40 employees in the unit).

1411-80-R: Syndicat des Conseillers en publicite Le Droit Ltée (C.S.N.), (Applicant) v. Le Droit Ltée, (Respondent) v. Ottawa Typographical Union, Local 102, (Intervener).

Unit: “all salesmen (publicity consultants) of classified or commercial advertising employed by Le Droit Ltée newspaper, save and except manager, employees already covered by another bargaining unit, inside salesmen, representatives dealing with national accounts and house accounts, or persons normally excluded by law.” (9 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1413-80-R: Canadian Transportation Workers Union #199, National Council of Canadian Labour, (Applicant) v. Trans Pro Personnel Services, (Respondent).

Unit: “all employees of the respondent working in or out of the respondent’s terminal in the City of Guelph, in the County of Wellington, save and except foremen, persons above the rank of foreman, office staff, sales staff, dispatchers and persons regularly employed for not more than twenty-four (24) hours per week.” (12 employees in the unit). (*Having regard to the agreement of the parties*).

1414-80-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1410; 1425; 1592; 1669; 1916; and 2309, (Applicant) v. Quinte Machine and Steel Corporation, (Respondent).

Unit: “all millwrights and millwrights’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwrights and millwrights’ apprentices in the employ of the respondent in all other sectors in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1423-80-R: Canadian Union of Public Employees, (Applicant) v. Algoma District Homes for the Aged – Thessalon, (Respondent).

Unit #1: “all employees of the respondent at the Town of Thessalon, in the District of Algoma, save and

except supervisors, persons above the rank of supervisor, office staff, registered nurses, students employed during the school vacation period, and persons regularly employed for not more than twenty-four (24) hours per week.” (82 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at the Town of Thessalon, in the District of Algoma, employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and registered nurses.” (29 employees in the unit).

1429-80-R: London and District Service Workers’ Union, Local 220, (Applicant) v. Hanover and District Hospital, (Respondent).

Unit: “all office and clerical employees of the respondent at Hanover save and except supervisors, persons above the rank of supervisor, the Personnel Officer, the Administrator’s Secretary, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.” (8 employees in the unit).

1430-80-R: London and District Service Workers’ Union, Local 220, (Applicant) v. Hanover and District Hospital, (Respondent).

Unit: “all office and clerical employees of the respondent at Hanover regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, the Personnel Officer, the Administrator’s Secretary, and persons covered by subsisting collective agreements.” (3 employees in the unit).

1434-80-R: Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Brantwood Residential Development Centre, (Respondent).

Unit: “all employees of the respondent in Brantford, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, employee health nurse, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, director of activities, technical personnel, professional personnel, office and clerical staff, rehabilitation placements, supervisors, and persons above the rank of supervisor.” (15 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1435-80-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Brantford Residential Development Centre, (Respondent).

Unit: “all employees of the respondent in Brantford, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, employee health nurse, graduate pharmacists, undergraduate pharmacists, graduate dieticians, students dieticians, director of activities, technical personnel, professional personnel, office and clerical staff, rehabilitation placements, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (74 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1436-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. B & W Heat Treating (1975) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Kitchener, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (104 employees in the unit). (*Having regard to the agreement of the parties*).

1443-80-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Applicant) v. Suisha Gardens Limited, (Respondent).

Unit: "all employees of the respondent in Ottawa, save and except manager, assistant manager, executive chef, head chef, office staff and persons above the rank of assistant manager." (26 employees in the unit).

1445-80-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Villacentres Management Ltd. (Operators – Park Plaza Hotel), (Respondent).

Unit: "all employees of the respondent employed in the Prince Arthur dining room at the Park Plaza Hotel, Toronto, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (13 employees in the unit). (*Having regard to the agreement of the parties*).

1447-80-R: United Steelworkers of America, (Applicant) v. Baltimore Aircoil Interamerican Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Halton Hills, save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period." (54 employees in the unit). (*Having regard to the agreement of the parties*).

1459-80-R: Labourers' International Union of North America Local 837, (Applicant) v. Raney, Tari, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (26 employees in the unit).

1473-80-R: Ontario Nurses' Association, (Application) v. Participation House – Hamilton & District, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by Participation House – Hamilton & District, in Binbrook, Ontario, save and except co-ordinators and persons above the rank of co-ordinators." (10 employees in the unit). (*Having regard to the agreement of the parties*).

1476-80-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Barratt Spun Concrete Poles Ltd., (Respondent).

Unit: "all employees of the respondent in Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

1486-80-R: Ontario Nurses' Association, (Applicant) v. Algoma District Homes for the Aged Sault Ste. Marie, (Respondent).

Unit #1: "all registered and graduate nurses employed by F.J. Davey Home in Sault Ste. Marie, Ontario in a nursing capacity, save and except the Director of Nursing, Assistant Director of Nursing, persons above the rank of Director of Nursing, Resident Social Services Co-ordinator, and persons regularly employed for not more than twenty-four (24) hours per week." (11 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity by F.J. Davey Home in Sault Ste. Marie, Ontario, save and except

the Director of Nursing, Assistant Director of Nursing, persons above the rank of Director of Nursing and Resident Social Services Co-ordinator.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

1488-80-R: Labourers’ International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 290, (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance employed at 20 Forest Manor Road, Willowdale, Ontario, including resident superintendents, save and except property manager, office and clerical staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

1490-80-R: Hotel, Restaurant & Cafeteria Employees Union – Local 75, (Applicant) v. Nags Head Tavern (Eaton Centre) (a Division of Nags Head Tavern Limited), (Respondent).

Unit #1: “all employees of the respondent employed in the Eaton Centre in Metropolitan Toronto, save and except head chef, host or hostess, supervisors, persons above the rank of supervisor, persons covered by an existing collective agreement between the respondent and Local 280 of the International Beverage Dispensers’ & Bartenders’ Union, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (17 employees in the unit).

Unit #2: “all employees of the respondent in the Eaton Centre in Metropolitan Toronto who are regularly employed for not more than twenty-hour hours per week and students employed during the school vacation period, save and except head chef, host or hostess, supervisors, persons above the rank of supervisor, and persons covered by an existing collective agreement between the respondent and Local 280 of the International Beverage Dispensers’ & Bartenders’ Union.” (18 employees in the unit).

1494-80-R: Brotherhood of Railway, Airline & Steamship Clerks Freight Handlers, Express & Station Employees, (Applicant) v. Lontours Canada Limited, (Respondent) v. Employee, (Objector).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, person regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (9 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1503-80-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. The Ontario Jockey Club, (Respondent).

Unit: “all employees of the respondent engaged in maintenance at Greenwood Race Track and Woodbine Race Track in Metropolitan Toronto and Mohawk Raceway in the Town of Milton, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, office staff and persons covered by subsisting collective agreement.” (97 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1506-80-R: Canadian Union of Public Employees, (Applicant) v. Beaver Foods Limited – Nutricare Division, (Respondent).

Unit: “all employees of the respondent at Riverside Hospital of Ottawa, 1967 Riverside Drive, Ottawa, Ontario, save and except managers, supervisors, persons above the rank of supervisor, dietitians, student dietitians, chefs and office staff.” (56 employees in the unit). (*Having regard to the agreement of the parties*).

1513-80-R: Christian Labour Association of Canada, (Applicant) v. Black Top Enterprises Limited, (Respondent).

Unit: “all construction labourers, truck drivers and employees engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

1530-80-R: Service Employees International Union, Local 532, (Applicant) v. Spencer Brothers Nursing Home, (Respondent).

Unit: “all employees of the respondent in Hagersville, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, office staff, supervisors and persons above the rank of supervisor.” (29 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1531-80-R: Service Employees International Union, Local 532, (Applicant) v. Windsor Lodge (Hagersville) Incorporated, carrying on business as Windsor Lodge Nursing Home, (Respondent).

Unit #1: “all employees of Windsor Lodge Nursing Home in Hagersville, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than 24 hours per week.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of Windsor Lodge Nursing Home in Hagersville, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, and office staff.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

1536-80-R: Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Charterways Transportation Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent at Point Edward, Ontario, save and except forepersons, persons above that rank, office, and sales staff, dispatchers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (11 employees in the unit).

Unit #2: “all employees of the respondent at Point Edward, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except forepersons, persons above that rank, office and sales staff and dispatchers.” (90 employees in the unit).

1543-80-R: Canadian Union of Public Employees, (Applicant) v. Humewood House Association, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four hours per week, save and except executive director, secretary to the executive director, residential co-ordinator, secretary of community programmes and co-ordinator of community programmes.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

1566-80-R: The Halton Board of Education Office Personnel Association, (Applicant) v. The Halton Board of Education, (Respondent).

Unit: “all office, clerical and technical employees employed by the Halton Board of Education in the Regional Municipality of Halton who are regularly employed not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Education, secretaries to the Board, secretary to the Superintendent of Business and Finance, secretary to the Area Superintendent (Finance), secretary to the Superintendent of Instruction, secretary to the

Superintendent of Program, secretary to the Superintendent of Special Services, Planning Assistant, Testing Assistant, Personnel and Employee Relations staff, transportation staff, computer manager, computer personnel above the rank of computer operator, instructional media staff above the rank of senior technician, salary control clerk, internal audit department, Recording Secretary to the Administrative Council, Business Managers and students employed during the school vacation period.” (28 employees in the unit). (*Having regard to the agreement of the parties*).

1567-80-R: Retail, Wholesale, and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Robinson Cone (Division of Dover Industries Ltd.), (Respondent).

Unit: “all employees of the respondent at Hamilton, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except office cleaning staff, production manager, traffic manager, shipping supervisor maintenance supervisor, Haas supervisor, shift supervisors and persons covered by a subsisting collective agreement between the applicant and the respondent.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

1583-80-R: Labourers’ International Union of North America, Local 837, (Applicant) v. Special Foundations Systems Ltd., (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

1598-80-R: Teamsters Local Union No. 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Crane Canada Inc., Crane Supply Division, (Respondent).

Unit: “all employees of the respondent at Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

1608-80-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Rantex Brushes Inc., (Respondent).

Unit: “all employees of the respondent in Barrie, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (30 employees in the unit). (*Having regard to the agreement of the parties*).

1610-80-R: London and District Service Workers Union, Local 220, (Applicant) v. Merrymount Children’s Home, (Respondent).

Unit: “all employees of the respondent in London, Ontario, save and except supervisors, persons above the rank of supervisor, Preschool Director, Residential Co-ordinator and Non-Residential Co-ordinator, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

1613-80-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Crane Canada Inc., Crane Supply Division, (Respondent).

Unit: “all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above

the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1615-80-R: London and District Service Workers Union, Local 220, (Applicant) v. Merrymount Children’s Home, (Respondent).

Unit: “all employees of the respondent in London, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1616-80-R: Canadian Union of Restaurant and Related Employees, (Applicant) v. Foodcorp Limited, c.o.b. as Swiss Chalet Bar-B-Q., (Respondent).

Unit: “all employees of the respondent at its 2877 Bayview Avenue location in the borough of North York, in the Municipality of Metropolitan Toronto, except chefs and persons above the rank of chef.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

1618-80-R: United Steelworkers of America, (Applicant) v. Square D Canada Electrical Equipment Inc./Equipment Electrique Square D Canada Inc., (Respondent).

Unit: “all employees of the respondent in Port Colborne, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, plant nurse, sales staff, engineering and quality control staff, time study and methods analysts, and students employed during the school vacation period.” (80 employees in the unit). (*Having regard to the agreement of the parties*).

1630-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. V & B Excavating Co., (Respondent).

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all the employees of the respondent in all other sectors in Prince Edward County and the Townships of Lake Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1633-80-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1693, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bedco Division of Gerodon Inc., (Respondent).

Unit: “all carpenters and carpehters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

1662-80-R: International Union, United Automobile Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Canada ITW Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons

above the rank of foreman, office and sales staff.” (50 employees in the unit). (*Having regard to the agreement of the parties*).

1714-80-R: Construction Workers Local #6 affiliated with the Christian Labour Association of Canada, (Applicant) v. Harm Schilthuis and Rons Limited, (Respondent).

Unit: “all construction labourers, carpenters and carpenters’ apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1743-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Kilmer Van Nostrand Co. Limited, (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

Application Certified Subsequent to a Pre-Hearing Vote

1477-80-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. I.T.E. Industries Limited, (Respondent) v. Local Union 1590, International Brotherhood of Electrical Workers, (Intervener).

Unit: “all employees of the respondent’s Electrical Systems Group Switchgear Division, Mississauga, manufacturing operation, save and except executives, managers, supervisors, superintendents, foremen, and all sales, engineering, accounting personnel, office employees and other representatives of management, stationary engineers, plant guards and students hired for the school vacation period.” (260 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		259
Number of persons who cast ballots		238
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	131	
Number of ballots marked in favour of intervener	45	

Application Certified Subsequent to a Post-Hearing Vote

1045-80-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, Toronto of the Hotel and Restaurant Employees’ and Bartenders’ International Union (A.F.L. – C.I.C. – C.L.C.), (Applicant) v. Holiday Inn Don Valley, (Respondent).

Unit: “all employees of the respondent in Don Mills, Ontario regularly employed for not more than 16 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff, security staff, and persons covered by the subsisting collective agreement between the applicant and the respondent.” (55 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list		55
Number of persons who cast ballots		29
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	14	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1386-79-R: United Electrical, Radio and Machine Workers of America, (UE), (Applicant) v. RCA Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101, (Intervener) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: “all persons employed by the respondent as professional engineers, save and except Foremen and Administrators, persons above the rank of Foreman and Administrator, students employed during the school vacation periods, students employed during co-operative work terms, and persons covered by existing collective agreements.” (82 employees in the unit).

1482-79-R: Retail Clerks Union, Local 206, Chartered by the United Food and Commercial Workers International Union, (Applicant) v. Kitchener News Company Limited, (Respondent) v. Group of Employees, (Objectors)

1789-79-R: United Cement, Lime and Gypsum Workers International Union, (Applicant) v. Craftwood Construction Co. Ltd., (Respondent) v. The Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Intervener #1) v. Metropolitan Toronto Sewer & Watermain Contractors Association, (Intervener #2).

Unit: “all dependent contractors of the respondent engaged in handling materials to and from the respondents’ job sites in the Regional Municipality of Metropolitan Toronto (or Board Area #8) save and except non-working foreman, office and clerical staff, shop employees and security guards.” (4 employees in the unit).

1862-79-R: International Union of Operating Engineers, Local 793, (Applicant) v. Meaford and St. Vincent Community Centre Board, (Respondent) v. Employee, (Objector).

1872-79-R: United Cement, Lime and Gypsum Workers International Union, (Applicant) v. Coreydale Contracting Co., (Respondent) v. The Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Intervener #1) v. Metropolitan Toronto Sewer & Watermain Contractors Association, (Intervener #2).

Unit: “all employees (dependent contractors) of Coreydale Contracting Co. engaged as truckers in the Municipality of Metropolitan Toronto save and except foremen, dispatchers, persons above the rank of dispatchers and foremen, office and sales staff and persons represented by subsisting collective agreements.” (14 employees in the unit).

0006-80-R: Local 756 of the Hotel and Restaurant Employees Union, (Applicant) v. Corktown Tavern Limited, carrying on business as The Corktown Tavern, (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: “all employees regularly employed for not more than 24 hours a week and students employed during the school vacation period save and except supervisors and those above the rank of supervisor.” (9 employees in the unit).

0599-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Cooper’s Crane Rental Limited, (Respondent).

Unit: “all employees of the respondent working at or out of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff, students, employed during the school vacation period and persons covered by a subsisting collective agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency.” (1 employee in the unit).

0838-80-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Stan Vine Construction Inc., (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance at 2405 Finch Avenue, Weston, Ontario including resident superintendents, save and except property manager, office and clerical staff.” (2 employees in the unit).

1067-80-R: Retail, Wholesale and Department Store Union, AFL: CIO: CLC, (Applicant) v. Stedmans, Division of MacLeod – Stedman Inc., (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: “all employees of the respondent at Cochrane, Ontario regularly employed for not more than twenty-four hours per week, save and except Managers, persons above the rank of Manager, Office Staff, and pending the final determination of the matter in dispute, excluding as well the lunch counter supervisor.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

1083-80-R: Service Employees’ International Union, Local 183, A.F. of L., C.I.O., C.L.C., (Applicant) v. The Village Green Nursing Home Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: “all employees of the respondent in Selby, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, and office staff, and pending the final determination of the matters in dispute, excluding as well registered nursing assistants and maintenance supervisor.” (employees in the unit). (*Having regard to the partial agreement of the parties*).

1227-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Bennett Paving & Materials Limited, (Respondent) v. Group of Employees.

1345-80-R: Canadian Union of Public Employees, (Applicant) v. Muskoka Lodge Nursing Home, (Respondent).

1474-80-R: London and District Service Workers’ Union, Local 220, (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Joseph’s Hospital, London, Ontario, (Respondent).

1609-80-R: Canadian Union of Public Employees, (Applicant), v. Case Manor, (Respondent) v. Group of Employees, (Objectors).

Unit: “all of the registered nurses of the respondent in the County of Victoria, save and except the director of nurses and those above the rank of director of nurses.” (5 employees in the unit) (*Having regard to the agreement of the parties*).

Certifications Dismissed Subsequent to a Pre-Hearing Vote

0239-80-R: Labourers’ International Union of North America, Local 506, (Applicant) v. April Waterproofing Limited, (Respondent), v. Local 598 of the Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list originally prepared by employer	3
Number of persons who cast ballots	3

1122-80-R: Graphic Arts International Union Local 12-L, Toronto, Ontario, (Applicant) v. American Can of Canada Limited, (Respondent) v. Printing Specialties and Paper Products Union, Local 466, (Intervener #1) v. Canadian Paperworkers Union, (Intervener #2).

Unit: "all employees of the Company at Brampton, Ontario, save and except foreman, persons above the rank of foreman, guards, engineers, office staff, sales staff, and temporary or probationary employees." (234 employees in the unit).

Number or names of persons on revised voters' list	234
Number of persons who cast ballots	211
Number of ballots marked in favour of applicant	87
Number of ballots marked in favour of intervener #1	88
Number of ballots marked in favour of intervener #2	35
Ballots segregated and not counted	1

Second Vote

Number of names of persons on list as originally prepared by employer	232
Number of persons who cast ballots	205
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	203
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	98
Number of ballots marked in favour of intervener #1	104
Ballots segregated and not counted	2

Certifications Dismissed Subsequent to a Post-Hearing Vote

0072-80-R: United Steelworkers of America, (Applicant) v. Empco-Fab Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent company in Whitby, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff." (30 employees in the unit).

Number of names of persons on list as originally prepared by employer	30
Number of persons who cast ballots	28
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	14

1158-80-R: United Food and Commercial Workers International Union, A.F.L. - C.I.O. - C.L.C., (Applicant) v. Central Smoked Fish Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foreman, those above the rank of foreman, and office and sales staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots		8
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	7	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1043-80-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Irwin Foster, Foster's Flooring Ltd., Aldershot Flooring Ltd., Foster's Industrial Door Repairs, (Respondents).

1455-80-R: Canadian Union of Public Employees, Local 1000, (Applicant) v. Ontario Hydro, (Respondent).

1505-80-R: United Steelworkers of America, (Applicant) v. Sunrise Wire Products, (Respondent).

1611-80-R: Labourers' International Union of North America, Local 527, (Applicant) v. Continental Mushroom Corporation Limited, Continental Mushroom Corporation (1978) Ltd., (Respondent).

1631-80-R: Labourers' International Union of North America - Local 1081, (Applicant) v. Simon-Wood Limited, (Respondent).

1632-80-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Carr Steel Construction Limited, (Respondent).

1641-80-R: Labourers' International Union of North America - Local 183, (Applicant) v. Finch Paving Co. Ltd., (Respondent).

1693-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Greenwin Property Management, (Respondent).

1704-80-R: Energy and Chemical Workers Union, (Applicant) v. Unitog Canada Limited, (Respondent).

1855-80-R: Canadian Paperworkers Union, (Applicant) v. Lily Cups Limited, (Respondent),

APPLICATION FOR ACCREDITATION

0357-80-R: The Ontario Form Work Association, (Applicant) v. The Formwork Council of Ontario, A council of Unions, Acting as the Representative and Agent of the Labourers' International Union of North America, Local 183 and The International Union of Operating Engineers, Local 793, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0701-80-R: Rene Herweyer, (Applicant) v. Retail Clerks Union Local 486, (Respondent) v. Steve Duga, carrying on business as Otto's Deli, (Intervener). (13 employees). (*Dismissed*).

1055-80-R: Bruno Chelchowski, (Applicant) v. International Union of Operating Engineers Local 793, (Respondent). (unit).

Unit: "all employees of Esam Construction Limited in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same other than such employees who are employed in the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

1069-80-R: Hilda Griffiths and All Employees Listed on the Petition, (Applicant) v. Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Respondent) v. Safeguard Drugs Limited, (Intervener). (*Granted*).

Unit #1: "all full time employees of Safeguard Drugs limited at its stores in the City of Burlington, Ontario, save and except merchandise manager, persons above the rank of merchandise manager, merchandise manager trainees, pharmacists, pharmacist interns, student pharmacists, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (10 employees in the unit).

Unit #2: All part time employees of Safeguard Drugs Limited at its stores in the City of Burlington regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except merchandise manager, persons above the rank of merchandise manager, merchandise manager trainees, pharmacists, pharmacists interns and students pharmacists." (14 employees in the unit).

FULL TIME (Unit #1):

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	9	
Number of ballots marked in favour of the respondent	2	
Number of ballots marked against the respondent	7	

PART TIME (Unit #2):

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	13	
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	13	

1112-80-R: Janet Sonderhouse, (Applicant) v. Graphic Arts International Union Local 517, (Respondent) v. Walkerville Printing Company Limited, (Intervener). (1 employee). (*Dismissed*).

1296-80-R: Clerical Staff of the Orillia Water, Light & Power Commission, (Applicant) v. I.B.E.W. Local 636, (Respondent) v. Orillia Light & Power Commission, (Intervener).

Unit: "all office and clerical employees of the respondent in Orillia, save and except the secretary to the General Manager, supervisors, persons above the rank of supervisor, draftsmen, technicians, persons who work less than twenty-four (24) hours per week, students employed during the school vacation period and persons represented under subsisting collective agreements." (6 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots		6
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	5	

1353-80-R: Albert Leo Roluf and Robert Oscar Rungis, (Applicants) v. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local 669, (Respondent) v. Famous Players Limited, (Intervener #1) v. Canadian Odeon Theatres Limited, (Intervener #2). (6 employees). (*Granted*).

1454-80-R: Gary Billett, Mark Wolfe, LeRoy R. Martin, (Applicants) v. Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada, (Respondent) v. Chatham Painting & Decorating (Louis Thibodeau, (Intervener). (3 employees). (*Granted*).

1652-80-R: Paul Borg and all other bargaining unit members on Fighting Island, (Applicants) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Local No. 880, (Respondent). (*Granted*).

1700-80-R: Employees of Banvil Ltd., (Applicant) v. Teamsters Local Union 1000, (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 54

0985-80-R: Teamsters Local Union No. 1985 Chemical, Energy and Allied Workers, chartered by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Pilkington Glass Industries Ltd., (Respondent). (*Granted*).

1573-80-R: Graphic Arts International Union, Local 211, (Applicant) v. Graphic Tradehouse Ltd., (Respondent). (*Granted*).

1574-80-R: Graphic Arts International Union, Local 211, (Applicant) v. Photoengravers and Electrotypers Limited, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1637-80-R: Wabco Ltd., (Applicant) v. Those persons named in schedules A, B, and C attached hereto, (Respondent). (*Granted*).

1736-80-U: Sudbury Construction Association, Spiers Industrial Contractors Inc., Spiers Brothers Limited, ROMM Construction Company Limited, (Applicants) v. Sudbury Building and Construction Trades Council L, Popovich, The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of United States and Canada, Local 800, and M. Zangari, (Respondents). (*Dismissed*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0837-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant). (*Granted*).

2200-79-U: Ontario Council of Leather Workers, (Complainant) v. Natural Footwear Limited, (Respondent). (*Dismissed*).

0048-80-R: United Brotherhood of Carpenters & Joiners of America, Local 3054, (Complainant), v. Selinger Wood Limited, Robert Selinger, (Respondents). (*Granted*).

0504-80-U: Henry Forget, (Complainant) v. United Brotherhood of Carpenters and Joiners of America Local 38, (Respondent). (*Dismissed*).

0603-80-U: Ontario Public Service Employees Union, (Complainant) v. Town of Midland, Board of Parks Management, (Respondent). (*Granted*).

0633-80-R: Service Employees Union Local 204, (Complainant) v. Kennedy Lodge Nursing Home, (Respondent). (*Dismissed*).

0982-80-U: Lumber and Sawmill Workers' Union, Local 2995, (Complainant) v. Elk Lake Planing Mill Limited, (Respondent). (*Withdrawn*).

1057-80-U: United Steelworkers of America, (Complainant) v. Garco Machining Services, (Respondent). (*Withdrawn*).

1059-80-U: William Almas, (Complainant) v. London and District Service Workers' Union Local 220 and Victoria Hospital Corporation, (Respondents). (*Dismissed*).

1089-80-U: Michael A. Miller, (Complainant) v. International Woodworkers of America Local 42, (Respondents) v. Canbar Products Limited, (Employer). (*Dismissed*).

1096-80-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. National Dry Company Ltd., (Respondent). (*Dismissed*).

1132-80-U: Canadian Union of Operating Engineers & General Workers, (Complainant) v. Glengarry Bus Line Inc., (Respondent). (*Granted*).

1177-80-U: Maria Alice Barroga, (Complainant) v. C.U.P.E. Local 1474, (Respondent) v. The Doctors Hospital, (Intervener). (*Dismissed*).

1248-80-U: Joy A. Harrington, (Complainant) v. R.W.D.S.U. Local 414, (Respondent), v. Dominion Stores Limited, (Intervener). (*Dismissed*).

1267-80-U: Carol Webster, (Complainant) v. Bruce Janisse and Service Employees Union, Local 210, (Respondent). (*Dismissed*).

1283-80-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, (Complainant) v. Ontario Hydro, (Respondent). (*Withdrawn*).

1336-80-U: Colin T. Cobb, (Complainant) v. General Supply, (Respondent). (*Withdrawn*).

1340-80-U: International Union of Operating Engineers, Local 793, (Complainant) v. General Supply, (Respondent). (*Withdrawn*).

1363-80-U: Canadian Union of Public Employees, (Complainant) v. Sunnycrest Nursing Homes Ltd., (Respondent). (*Dismissed*).

- 1376-80-U:** Retail, Wholesale & Department Store Union AFL-CIO-CLC, (Complainant) v. United Cigar Stores Group Limited, (Respondent). (*Withdrawn*).
- 1415-80-U:** Thomas P. Long, (Complainant) v. Canadian Union of Public Employees Local 114, (Respondent). (*Withdrawn*).
- 1416-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Pizza Pizza, (Respondent). (*Withdrawn*).
- 1425-80-U:** Emil Dezelak, (Complainant) v. Frankel Steel, (Respondent). (*Withdrawn*).
- 1426-80-U:** Service Employees International Union, Local 183, (Complainant) v. Trent Valley Lodge Nursing Home, (Respondent). (*Withdrawn*).
- 1427-80-U:** Maria Di Pede, (Complainant) v. Amalgamated Clothing and Textile Workers Union Local 1464, (Respondent). (*Withdrawn*).
- 1468-80-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, Ontario, (Complainant) v. Frank Teshima, Owner, Suisha Gardens Limited, (Respondent). (*Withdrawn*).
- 1469-80-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, Ontario, (Complainant) v. Frank Teshima, Owner, Suisha Gardens Limited, (Respondent). (*Withdrawn*).
- 1470-80-R:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, Ontario, (Complainant) v. Frank Teshima, Owner, Suisha Gardens Limited, (Respondent). (*Withdrawn*).
- 1497-80-U:** Ontario Public Service Employees Union, (Complainant) v. Hopital Montfort, (Respondent). (*Withdrawn*).
- 1507-80-U:** Mohamad I. Patel, (Complainant) v. U.A.W. Local 303, (Respondent). (*Dismissed*).
- 1517-80-U:** Miss Mona Hansen, (Complainant) v. Peoples' Jewellers Ltd. Brampton, Ontario, (Respondent). (*Withdrawn*).
- 1538-80-U:** United Cement, Lime & Gypsum Workers International Union, (Complainant) v. Canada Cement Lafarge Ltd., (Respondents). (*Dismissed*).
- 1560-80-U:** Allan Naulls, (Complainant) v. Local Union #46, Plumber & Pipe Fitters and William Howard, Business Agent, (Respondents). (*Withdrawn*).
- 1561-80-U:** Canada Cement Lafarge Ltd., (Complainant) v. United Cement, Lime & Gypsum Workers International Union and its Local 368, (Respondents). (*Granted*).
- 1580-80-U:** Canadian Union of Public Employees, (Complainant) v. Case Manor Nursing Home, (Respondent). (*Withdrawn*).
- 1581-80-U:** C.J. Savereux, (Complainant) v. City of Windsor, (Respondent). (*Withdrawn*).
- 1604-80-U:** Nerissa Davis, (Complainant) v. Sunnybrook Medical Centre University of Toronto and Sunnybrook Hospital Employees' Union, Local 777 A.F.L. – C.I.O. – C.L.C., (Respondents). (*Withdrawn*).
- 1614-80-U:** S. Calaminici, (Complainant) v. Temasters Union, Local 424, (Respondent). (*Dismissed*).
- 1619-80-U:** United Steelworkers of America, (Complainant) v. Sunrise Wire Products Ltd., (Respondent). (*Withdrawn*).
- 1648-80-U:** Welland Typographical Union Local 927 (ITU), (Complainant), The Evening Tribune, (Respondent). (*Withdrawn*).
- 1649-80-U:** Peterborough Typographical Union, Local 248 (ITU), (Complainant) v. The Peterborough Examiner, (Respondent). (*Withdrawn*).

1666-80-U: C. J. Savereux, (Complainant) v. C.U.P.E.L. 543, (Respondent). (*Withdrawn*).

1707-80-U: Labourers' International Union of North America, Local 527, (Complainant) v. Continental Mushroom Corporation Limited and Continental Mushroom Corporation (1978) Limited, (Respondent). (*Withdrawn*).

1738-80-U: Canadian Paperworkers' Union, (Complainant) v. Standard Paper Box Inc., (Respondent). (*Withdrawn*).

1741-80-U: Thomas Atherley, (Complainant) v. Ontario Hydro, (Respondent). (*Dismissed*).

1748-80-U: Ms. Lee Ann Taylor, (Complainant) v. Mr. Jack MacDowell, Union Head Veteran Cab Company, (Respondent). (*Withdrawn*).

APPLICATIONS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

1516-80-OH: Dave Wilgress, (Complainant) v. Canada Sand Papers Co. Ltd., (Respondent). (*Withdrawn*).

1564-80-OH: Marlene Anne Morris, (Complainant) v. Steven Smith, President Cooper-Smith of Oshawa (1978) Ltd., (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39 (RELIGIOUS EXEMPTION)

1462-80-M: Richard L. J. Lizotte, (Applicant) v. Service Employees Union, Local 210, (Respondent Trade Union) v. Chatham and District Ambulance Service, (Respondent Employer). (*Withdrawn*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1636-80-M: Alcan Canada Products – Bracebridge Works, (Applicant) v. United Steelworkers of America, Local 7949, (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 55

0803-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. M. & M. Excavating Limited, and M. & M. Excavating and/or Aurald Enterprises Limited and/or Aurald Enterprises Limited, carrying on business as M. & M. Excavating, (Respondents). (*Granted*).

1291-80-R: A Council of Trade Unions acting as the representative of: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 880 and Labourers' International Union of North America, Local 625-749 and International Union of Operating Engineers, Local 793, (Applicant) v. Dunlins Contractors Limited, Almaga Contractors & Engineers Inc. and Almaga Dunlins Limited, (Respondents). (*Granted*).

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1142-80-M: Canadian Union of Public Employees Local 115 (Inside Workers), (Applicant) v. The Corporation of the City of Brockville, (Respondent). (*Withdrawn*).

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0796-80-M: Council of Trade Unions Teamsters Local Union No. 230, and Labourers International Union of North America Local Union 183, (Applicants) v. Repac Construction & Materials Limited, (Respondent). (*Withdrawn*).

0830-80-M; 0831-80-M: Sheet Metal Workers International Association and Ontario Sheet Metal Workers' Conference (for Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539, and 562) for and on behalf of Local 235, (Applicant) v. Ontario Sheet Metal and Air Handling Group, (Respondents). (*Dismissed*).

0907-80-M: International Brotherhood of Painters and Allied Trades and the Ontario Council of Painters and Allied Trades and Local 1590 Sarnia, Ontario, (Applicant) v. C.H. Heist Ltd., (Respondent). (*Withdrawn*).

0933-80-M: International Union of Operating Engineers, Local 793, (Applicant) v. Val-Ros Construction Ltd., (Respondent). (*Withdrawn*).

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1246-80-M: Labourers' International Union of North America, Local 1089, (Applicant) v. MiClar Construction Co. Limited, (Respondent). (*Granted*).

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1526-80-M: Local Union 800 of The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and The Ontario Pipe Trades Council, (Applicants) v. M & A Mechanical and Mechanical Contractors' Association of Ontario, (Respondents). (*Withdraw*).

1544-80-M: Labourers' International Union of North America – Local 183, (Applicant) v. Metropolitan Toronto Apartment Builders Association and Academy Homes (Academy Consolidated Dev. Inc.), (Respondents). (*Withdrawn*).

1546-80-M: International Association of Heat and Forst Insulators and Asbestos Workers, Local 95, (Applicant) v. Holscot Construction Limited, (Respondent). (*Granted*).

1548-80-M: Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ranfas Engineering & Construction Ltd., (Respondent). (*Granted*).

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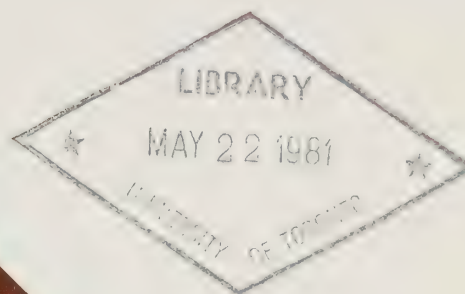
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*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778

OCT 5 1982

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